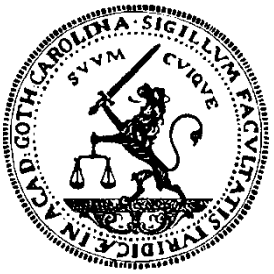

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The Role of the ECHR in Climate Change

Difficulties and Solutions in Implementing an Obligation to Combat Climate Change

JURM02 Graduate thesis

Graduate thesis, Master of Laws program

30 higher education credits

Supervisor: Vladislava Stoyanova

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Table of contents

Summary

This thesis examines the ECHR with the aim of exploring the possible existence of positive substantive obligations connected to climate change and pertaining to the right to life and right to health as expressed in article 2 and 8 of the Convention. It departs by compiling how a positive substantive obligation is found in the ECHR system. It concludes that there must be a threat of harm to the right of life or health of a specific individual or a group of people. Moreover, three criteria must be answered affirmatively. Firstly, the state must have had or ought to have had knowledge about the threat. Secondly, the omission to act or the inadequate action of the state in order to stop the threat must somehow pertain to the harm, showing causation. Thirdly, holding the state responsible must be reasonable, and the obligation levied against it cannot impose an unreasonable or disproportionate burden. It is further found that these criteria intertwine and mutually affect each other in several places.

In the next chapter the thesis moves on to establish and summarize the best available science concerning climate change and how Europe will be affected by these changes. It is found that the greatest threats to the right of life and health will be posed by the rising temperature itself and its direct effects, such as heatwaves and rising sea levels, as well as the increased precipitation and its compound effects, such as floods and landslides. These effects are concluded to already constitute a threat to the enjoyment of the right to life and health, with continued and increased global warming only resulting in worsening the impacts of the threats.

The text finishes by tackling the main question of the thesis, mainly proposing that there two possible substantive positive obligations could exist. Described in abstract they would both consist of an obligation to create regulatory frameworks to safeguard the rights laid down in the Convention. The first proposed obligation is one requiring adaptation. As climate change causes threats to appear this obligation would require states to implement adaptations to protect the people under their jurisdiction from these threats. The second proposed obligation is an inward-looking obligation of cooperation requiring mitigation in connection to a states nationally determined contributions in the Paris Agreement. The criterium of state knowledge is deemed as fulfilled due to the objective available science and the signing of both the Paris Agreement and the UNFCCC. Problems of implementation are however found when the investigation moves on to causation and reasonableness. It could be hard to connect the omissions of states to limit global warming to the harm experienced by people and depending on the deliberations of the Court the proposed obligations could be seen as unreasonable. It is suggested that some of the found problems could be solved by leaning heavily on the Paris Agreement and the scientific knowledge, allowing them to inform the content of the obligations.

Sammanfattning

I uppsatsen granskas Europakonventionen i syfte att undersöka om det kan finnas positiva materiella skyldigheter kopplade till klimatförändringar samt rätten till liv och hälsa uttryckta i artikel 2 och 8 i konventionen. Den börjar med att sammanställa hur en positiv materiell skyldighet kopplad till Europakonventionen uppkommer. Slutsatsen är att det krävs ett hot om kränkning av rätten till liv eller hälsa riktad mot en viss individ eller en grupp av människor. Dessutom måste tre kriterier besvaras jakande. För det första måste staten ha haft eller borde ha haft kännedom om hotet. För det andra måste underlåtenheten att agera eller statens otillräckliga agerande för att stoppa hotet på något sätt hänföra sig till skadan och därmed visa ett orsakssamband. För det tredje måste det vara rimligt att hålla staten ansvarig, och den skyldighet som åläggs den får inte medföra en orimlig eller oproportionerlig börda. Det framkommer vidare att dessa kriterier flätas samman och ömsesidigt påverkar varandra på flera ställen.

I nästa kapitel går uppsatsen vidare till att etablera och sammanfatta den bästa tillgängliga vetenskapen om klimatförändringar och hur Europa kommer att påverkas av dessa förändringar. Det har visat sig att de största hoten mot rätten till liv och hälsa kommer att utgöras av de stigande temperaturen och dess följdeffekter, såsom värmeböljor och stigande havsnivåer, samt den ökade nederbörden och dess följdeffekter, såsom översvämningar och jordskred. Slutsatsen är att dessa effekter redan utgör ett hot mot rätten till liv och hälsa och att den fortsatta och ökade globala uppvärmningen endast leder till att effekterna av hoten förvärras.

Avslutningsvis hanteras uppsatsens huvudfråga. Det föreslås i huvudsak att det skulle kunna finnas två möjliga materiella positiva skyldigheter. Abstrakt beskrivet skulle de båda bestå av en skyldighet att skapa regelverk för att skydda de rättigheter som fastställs i konventionen. Den första föreslagna skyldigheten kräver anpassning. Då klimatförändringarna leder till att hot uppstår skulle skyldigheten kräva att staterna genomför anpassningar för att skydda de människor som står under deras jurisdiktion. Den andra föreslagna skyldigheten är en inåtvänd samarbetsskyldighet som kräver motverkan av grunderna till klimatförändringarna kopplad till en stats nationellt fastställda klimatplaner i Parisavtalet. Kriteriet för kännedom anses vara uppfyllt på grund av den tillgängliga vetenskapen och undertecknandet av både Parisavtalet samt UNFCCC. Problem med implementeringen framkommer dock när utredningen går vidare till orsakssamband och rimlighet. Det kan vara svårt att koppla staternas underlåtenhet att begränsa den globala uppvärmningen till den skada som människor upplever, och beroende på domstolens överläggningar kan de föreslagna skyldigheterna ses som orimliga. Det förordas att några av de funna problemen skulle kunna lösas genom att luta sig tungt mot Parisavtalet och den tillgängliga vetenskapen, vilket gör det möjligt för dem att utfylla skyldigheternas innehåll.

Preface

> The Earth is the only world known so far to harbor life. There is nowhere else, at least in the near future, to which our species could migrate. Visit, yes. Settle, not yet. Like it or not, for the moment the Earth is where we make our stand.
>
> Carl Sagan, *Pale Blue Dot: A Vision of the Human Future in Space*, (1994).

Humanity stands at a dangerous crossroads. The functioning of our global society is starting to seem like a downward spiral with its inevitable end in the total upheaval of that very society. The intertwinement between human rights law and climate change is complex and contentious. Yet human rights law could be a tool in ensuring that action is taken to preserve what can be saved. In this thesis I have tried to highlight the challenges and possibilities of choosing such a course. I can but hope that I have succeeded.

The writing process has been challenging and involved many frustrated hours of staring out on the autumn gloom of Lund. I wished that the words would fall out of me as easily as the leaves fell from the trees. Alas, such was not the case. For helping me collect the scattered thoughts that still came out of my head and for listening to my ramblings I owe a big thanks to Anna as well as my supervisor Vladislava Stoyanova.

More than five years of study are coming to a close. I am filled with excitement and trepidation for what comes next. But for now, I am more than happy to just enjoy the snow, and to deal with my newfound coffee addiction.

Uppsala, 1 January 2024
Cesar Örvall

Abbreviations

AR6	The Sixth Assessment Report of the Intergovernmental Panel on Climate Change[1]
AR5	The Fifth Assessment Report of the Intergovernmental Panel on Climate Change[2]
AR4	The Fourth Assessment Report of the Intergovernmental Panel on Climate Change[3]
CC2022	Climate Change 2022: Impacts, Adaptation, and Vulnerability[4]
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts[5]
ECHR	European Convention on Human rights[6]
The Convention	European Convention on Human rights
ECtHR	European Court of Human Rights
The Court	European Court of Human Rights
GHG	Greenhouse gas
IPCC	The Intergovernmental Panel on Climate Change
NDC	Nationally determined contributions
UNFCCC	United Nations Framework Convention on Climate Change[7]
VCLT	Vienna Convention on the Law of Treaties[8]

[1] IPCC, 2023: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, 184 pp.

[2] IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp.

[3] IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp.

[4] IPCC, 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press. Cambridge University Press, Cambridge, UK and New York, NY, USA, 3056 pp.

[5] Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001, vol. II (part 2).

[6] European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

[7] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[8] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

1 Chapter 1 – Introduction

1.1 Background

Global warming and climate change have become facts to live with. As of 2023 the warming temperature increase, unequivocally caused by human activities, was estimated at 1.1°C and the effects are starting to become felt globally.[9] The goals stipulated in the Paris Agreement seem harder to achieve,[10] and the possible consequences for humanity are dire.[11] It has even been said that climate change potentially is "the greatest threat to human rights in the twenty-first century."[12] The effects experienced in Europe already threaten the lives and health of people on the continent and they are only expected to worsen.[13]

With such threats it is understandable that there is an ongoing debate on whether or not human rights treaties should protect people from climate change, producing an obligation to either combat it directly or its effects.[14] The arguments are several and express various views on the topic. Zahar for example states that the existence of any obligation to reduce the emissions of GHGs is "not so much wrong as nonsensical".[15] Knox on the other hand suggests that states have rather extensive extraterritorial obligations requiring them to cooperate and take into account the interests of other states when actions are taken. With this foundation he continues by stating that the obligation entails not only adaptations based on domestic benefits, but also achieving mitigations above and beyond what is stipulated in the Paris

[9] AR6, p. 42–66.

[10] Compare Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79, article 2.

[11] See for example CC2022.

[12] Mary Robinson, 'Social and Legal Aspects of Climate Change', *Journal of Human Rights and the Environment* 5, no. Special Issue (2014): 15–17, p. 15.

[13] CC2022 p. 1819–1872.

[14] See for example; Alan Boyle, 'Human Rights and the Environment: Where Next?', *European Journal of International Law* 23, no. 3 (1 January 2012); Alexander Zahar, 'Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions', *Human Rights Review* 23, no. 3 (September 2022): 385–411, p. 407; Benoit Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?', *American Journal of International Law* 115, no. 3 (July 2021): 409–451; Helen Keller, Corina Heri, and Réka Piskóty, 'Something Ventured, Nothing Gained?—Remedies before the ECtHR and Their Potential for Climate Change Cases', *Human Rights Law Review* 22, no. 1 (6 January 2022); John H. Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/31/52, 1 February 2016; Mary Robinson, 'Social and Legal Aspects of Climate Change', *Journal of Human Rights and the Environment* 5, no. Special Issue (2014): 15–17; Ole W. Pedersen, 'Any Role for the ECHR When It Comes to Climate Change?', *European Convention on Human Rights Law Review* 3, no. 1 (29 December 2021): 17–22.

[15] Zahar (2022) p. 407.

Agreement.[16] This thesis will attempt to contribute to the debate from a human rights perspective.

In Europe this has manifested both domestically and regionally. In the former case several individuals and groups have taken their respective governments to court, claiming that the state's policies to reduce GHG emissions, mitigate climate change or reach the goals set out in the Paris Agreement are inadequate.[17] The latter regional manifestations have taken the form of several lodged applications with the European Court of Human Rights from individuals seeing themselves, in one way or another, as victims of their home state's inadequate response to climate change.[18] At the time of writing the Court has yet to conclude any of the cases, resultingly there exist no conclusive answer to if any protection from climate change is included under the ECHR. What can be inferred is that throughout European society exists a feeling that states are not acting in a sufficient manner to ensure protection form the effects of climate change.

The aforementioned Paris Agreement states not only goals but also binding obligations of form and conduct. Although many of the most important articles for the protection of the climate remain non-binding, making them rather toothless.[19] It has however been suggested that the Agreement might become paramount in future cases before regional human rights courts, including the ECtHR, as a tool for interpretation.[20] The Court has stressed that the ECHR is a living instrument and that it must adapt to the conditions of the day.[21] To achieve this the evolution of the different state practices in the form of domestic legal systems as well as international treaties is taken into account.[22] As can be seen by the reports of the IPCC the climatic conditions of today are not the same as those when the convention was created.[23] Therefore it is possible that the a change in the scope of the convention will occur, expanding certain rights to encompass the effects of climate change.

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[16] Knox (2016) paras. 41–49, 65–80.

[17] See for example *Neubauer, et al. v. Germany*, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, Federal Constitutional Court - First Senate, 24 March 2021; *Urgenda Foundation v. State of the Netherlands*, ECLI:NL:HR:2019:2007, Supreme Court of The Netherlands, 20 December 2019.

[18] See pending cases before the ECtHR *Carême v. France*, no. 7189/21; *Duarte Agostinho and Others v. Portugal* and 32 Other States, no. 39371/20; *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20.

[19] Compare Daniel Bodansky, *International Climate Change Law*, First edition., Oxford Scholarly Authorities on International Law (Oxford University Press, 2017), table 7.1.

[20] Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation', *Review of European, Comparative & International Environmental Law* 32, no. 2 (2023): 237–249, p. 238.

[21] See for example *Tyrer v. United Kingdom*, no. 5856/72, 25 April 1978, para. 31.

[22] Geir Ulfstein, 'Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties', *The International Journal of Human Rights* 24, no. 7 (8 August 2020): 917–934, p. 921.

[23] AR6.

However, in order to implement such obligations several hurdles must be passed. Not the least being how to mediate between the Court's extended jurisdiction and the sovereignty of the states party to the convention. Criticism has already been raised concerning the use of the living instrument doctrine, stating that it acts as a hamper on state sovereignty by diminishing their margin of appreciation.[24] Moreover, mitigating climate change can be very expensive, requiring that a state invest large amounts of resources, money, and time.[25] How could an obligation balancing extensive duties with state sovereignty be formulated and how could it be implemented? Furthermore, a problem often brought up is that of causation.[26] How can the small global share of GHGs emitted by let us say the Netherlands be causally linked to the adverse effects of climate change experienced by the country's domestic population? Questions such as these will permeate the thesis.

1.2 Purpose and research question

The primary purpose of this thesis is to further the understanding of the substantive positive obligations connected to climate change within the ECHR system and investigate how human rights can be used in the battle against climate change, but also what the challenge in doing so entails. To achieve this the thesis will look closer at the prevailing ECtHR jurisprudence on the area, the extensive legal scholarship attempting to consolidate the Court's findings, as well as the great body of scientific research about climate change. This will make possible an analysis of both potential obligations and their theoretical implementation into the ECHR system.

The thesis aims to answer the following questions:

R: Does the ECHR contain any substantive positive obligations connected to climate change? If so, what might their content be?

In order to answer this overarching main question, the thesis will further investigate a number of sub questions. These are as follows:

a) How does the ECtHR establish a positive obligation?
b) How can the content of any positive substantive obligation connected to climate change be informed by the Paris Agreement?
c) What might the implementation of any positive substantive obligation connected to climate change look like?

[24] Rachael Ita and David Hicks, 'Beyond Expansion or Restriction? Models of Interaction between the Living Instrument and Margin of Appreciation Doctrines and the Scope of the ECHR', *International Human Rights Law Review* 10, no. 1 (23 June 2021): 40–74, p. 41–42.
[25] Mayer (2021) p. 417–418.
[26] Zahar (2022) p. 391–394.

1.3 Methodology

The thesis will adopt a legal-dogmatic approach. In the 2nd chapter this approach will be of the more classic kind, reviewing the ECHR system from an internal perspective.[27] Thus, the focus will be on the select major cases relevant to the subject at hand and the various doctrinal work that surrounds these cases. The nature of the questions asked require this focus to be further specified to mostly the right to life in article 2 and the right to respect for private and family life in article 8 of the ECHR since most of the debate regarding climate change and the convention circles around these rights.

The 2nd chapter uses these sources to mostly describe how positive legal obligations come to be. In contrast the 3rd chapter of the thesis will describe the potential new developments in the ECHR system caused by both new case law and societal change. Particularly the latter requires a subsequent broadening of the source-material utilised. Here the authoritative material will have to be extended to include other legal instruments relevant to the problem of climate change, changes in societal priorities, as well as scientific findings on the subject. These will include the UNFCCC, the Paris Agreement and the reports of the IPCC, to name a few. The purpose is to put above rights into perspective in the contemporary world with all the new challenges to human rights since this has not been done on the subject by the ECtHR. Consequently, a more prescriptive approach must be taken with the intention to establish the lex ferenda, in the cases where the lex lata cannot be satisfactorily determined. Nevertheless, the method will remain legal-dogmatic in its nature.[28]

Worth bringing up here is the source material used to establish what is known regarding climate change and its effects on the world in general and Europe in particular. Or more simply put in the language of the UNFCCC and the Paris Agreement, finding "the best available scientific knowledge".[29] The body of scientific research on the subject is massive and is compiled with regular intervals by the IPCC. The purpose of these reports is to provide the various conferences held under the Paris Agreement with the stated best available science.[30] Subsequently, the reports produced by the panel are some of the most reliable, detailed, and extensive on the subject of climate change in existence.[31] Using their reports as a foundation for the latter legal analysis thus ensures that the rest of the thesis stands stable and does not stray into scientific speculation. The reports of the IPCC bring up consequences of climate change not relevant either to the ECHR or the continent of Europe. Yet

[27] Jan M. Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research', in *Rethinking Legal Scholarship*, ed. Rob Van Gestel, Hans-W. Micklitz, and Edward L. Rubin, 1st ed. (Cambridge University Press, 2017), 207–228, p. 210–211.

[28] Compare. Smits (2017) p. 211–212, 217.

[29] See for example, Paris Agreement, preamble para. 5 and article 4.1; Compare UNFCCC, article 4.2.c–d.

[30] Voigt (2023) p. 240.

[31] IPCC, 'About — IPCC', accessed 31 October 2023, https://www.ipcc.ch/about/.

these are outside the scope of the thesis and will not be included. Unless of course the described global effects also affect Europe.

1.4 Delimitations

Due to the nature and scope of the paper some delimitations will have to be made. As previously stated, the thesis will focus on the various possible substantive positive obligations originating from article 2 and 8 in the ECHR. This choice was made since it is these two articles that are most commonly relied upon by applicants before the ECtHR in procedures concerning climate change, but also because the same is true for the materially adjacent environmental proceedings. Subsequently the doctrinal work on the subject tend to examine the system of the ECHR through a perspective of these two articles.

Further, the ECHR system is vast and contains several different criteria to be fulfilled in order for an obligation or a breach to be established. Such a criteria is that of victimhood. The jurisprudence from the ECtHR on the subject is rather extensive and could be the subject of a different thesis. Suffice to say that in many cases the establishment of a positive obligation or post facto breach of positive obligations through omission require a victim or individual to have been identified.[32] It is not the purpose of this thesis to delve into that topic, but rather to inform about what substantive positive obligations can be owed to such groups or people if they are recognized. A delimitation concerning any deeper analysis of victimhood is therefore made.

Yet another area that must be eliminated from the study is the remedies ordered by the court after a breach has been found. In the case of climate change litigation, it is difficult to specify what role the Court can play after having found a violation of a positive obligation. As can be seen in most cases the Court tends to satisfy itself with either finding a violation or not with remedies being limited to just satisfaction and pecuniary damages.[33] Whether this will change in climate cases to include more broad decisions concerning government policy is doubtful and up for debate and will not be touched upon by the following text.

1.5 Previous research

The fact that emission of GHGs can cause climate change has been known since before the 20th century.[34] That this anthropogenically caused climate

[32] Compare *Mastromatteo v. Italy* [GC], no. 37703/97, 24 October 2002, para. 68.

[33] See for example *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008; *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, 5 December 2013, paras. 262–274; *Hatton and Others v. United Kingdom* [GC], no. 36022/97, 8 July 2003, paras. 144–154.

[34] Joseph Fourier, "General Remarks on the Temperatures of the Globe and the Planetary Spaces" (1824), p. 27–31, John Tyndall, "The Bakerian Lecture: On the Absorption and Radiation of Heat by Gases and Vapours, and on the Physical Connexion of Radiation, Absorption, and Conduction" (1861), p. 32–38, Svante Arrhenius, "On the Influence of Carbonic

change was becoming a problem and needed to be faced by cooperative action was concluded at the latest in connection with the creation of the UNFCCC in 1992. When it comes to connecting climate change and human rights the study and debate has been more on the general side, attempting to encompass the entire corpus of human rights and how that can relate to climate change, or they have been written mainly to explain climate change law.[35] There are examples of when the studies have delved deeper. Zahar for example does a rigorous job explaining why connecting human rights law with the climate change regime would be difficult, bringing up challenges such as causation and non-triviality without offering any solutions.[36] Mayer on the other hand writes extensively on how to overcome certain challenges posed by the implementation of human rights in the climate change regime and how domestic climate cases affect the legal system as a whole.[37] Despite being more specified in their scope of inquiry, neither Zahar nor Mayer limit their geographical scope. Consequently, the more specific study relating to the ECHR is still lacking. An exception is Pedersen.[38] However his research, although being specified to the ECHR, is general in terms of the Court's future dealings with climate change. Furthermore, it mostly states challenges, and does not provide any solutions.

There is even a UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Yet the Special Rapporteur's research too is of a general nature.[39] This is understandable. The position is a UN one, making the scope of the held office global. Moreover, the problem of climate change is all encompassing in nature and likely will need a global response. Yet due to the flexibility of regional systems they can be more adaptable and responsive to change.[40] There is therefore a point in exploring the possibility of their applicability in relation to climate change.

Furthermore, there has been extensive research done on the Paris Agreement since its conception. Bodansky has deliberated quite comprehensively on the subject.[41] Although, his analysis is broad and made from a perspective of international law, not human rights law. Moreover, it focuses on determining the precise meaning of each article in the agreement and not on what effect

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Acid in the Air upon the Temperature of the Ground" (1896), p. 39–44, G. S. Callendar, "The Artificial Production of Carbon Dioxide and Its Influence on Temperature" (1938), p. 45–48, in *Making Climate Change History*, ed. Joshua P. Howe, Documents from Global Warming's Past (University of Washington Press, 2017).

[35] See for example Boyle (2012) p. 614; Bodansky (2017).

[36] Zahar (2022).

[37] Mayer (2021); Benoit Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change', *Journal of Environmental Law* 35, no. 2 (July 2023): 167–184.

[38] Pedersen (2021).

[39] See for example Knox (2016).

[40] Compare *The European Convention on Human Rights – A living instrument*, (European Court of Human Rights 2022) p. 7.

[41] Bodansky (2017).

those same articles might have on other international treaties. One who has delved into that subject is Voigt.[42] Her work has broadly described the possible effects of the Paris Agreement, both in itself and on other international regimes, including human rights law. As with the rest of the previous research however, this has lacked a deeper investigation regarding actual obligations and their possible implementation into the ECHR system.

Lastly, there has been extensive research done by both Stoyanova and Lavrysen into the nature of positive obligations in the ECHR system. Even though their conclusions about the Court differ in certain aspects,[43] an amalgamation of their research provides a good background to test the specific proposed obligations set out in the thesis.

This thesis contributes to the above research in following ways:

- It furthers the understanding of the role of the ECHR in relation to climate change.
- It tries to bridge the gap between human rights law and international environmental law.
- It attempts to find solutions to the application of human rights law in the climate change regime.

1.6 Structure

The following study will be conducted in three main steps. In chapter two the reader is given a detailed view on how positive obligations work in the ECHR system. The focus will be on substantive rights, but where necessary for further understanding some procedural aspects will be explained too.

The third chapter will begin with a rigorous investigation into the scientific background of climate change. The goal of this section is to find the best available science and thus construct a foundation for the rest of the chapter to build on. In so doing a series of threats to the enjoyment of human rights will be detailed and a framework to measure the Court's criteria of state knowledge, causation, and reasonableness will be created. In the third chapter the conclusions from the previous chapter will be applied in the context of climate change. The aim is to detail what obligations the high contracting parties might owe to their domestic populations connected to the threats of climate change, the right to life, and the right to health. The structure of this

[42] Voigt (2023).

[43] See for example Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016), p. 50, 165, 179; Laurens Lavrysen, 'Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova', *Human Rights Law Review* 18, no. 4 (1 January 2018): 705–718; Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights*, 1st ed, (Oxford University Press 2023b), chapter 5, footnote 17.

part of the chapter will be similar to the second one. But here the conclusions drawn from the second chapter will be applied to the subject of climate change and the threats found in the scientific background. As such potential obligations will be put forth and tested against the ECtHR's criteria of state knowledge, causation, and reasonableness with the goal of evaluating their scope and implementation.

Lastly there will be a conclusion, summarising the findings of the study. Further, it will aim to broaden the view and problematise the findings, arguing the various benefits and drawbacks.

2 Chapter 2 – Positive obligations in the ECHR system

2.1 Introduction

To give a steady foundation for the rest of this thesis to stand on the following chapter will methodically go through the required steps for a positive obligation to be established. The chapter will first explain the background of positive obligations demanded by the ECHR. Subsequently the omissions and incorrect actions that can give rise to a positive obligation are briefly touched upon, showing that the inadequate actions or omission must be attributable to the state in question and be wrongful. Necessarily, the next step therefore is explaining the elements of causation, state knowledge and reasonableness that establish responsibility of the state.

2.2 The foundations of positive obligations

The ECHR was created on the backdrop of the second world war. An era of history where authoritarianism and its effects had been made obvious to all. Therefore, the primary concern of the drafters of the Convention was not how to create positive obligations for states, but rather to ensure that states did not abuse their power to the detriment of individuals.[44] The focus thus was on what states were not allowed to do, not on what they were required to. The purpose was to avoid another rise of dictators and in extension war in Europe.[45]

Yet there were more threats to the inhabitants of the high contracting parties than only abusive use of power from the part of the state. Actions from other entities such as corporations and other private individuals can threaten the enjoyment of human rights.[46] The same is true of natural events, for example earthquakes, mudslides, and floods.[47] In all these cases the obligation is not a matter of refraining from interference but rather to ensure that full enjoyment of human rights can be achieved. Consequently, the breach to these obligations will often be in the form of an omission to act or act in a sufficient manner.[48]

Important to bring up is the evolution of the Convention in order to continuously adapt to the changes of priorities, state practice and societal change.

[44] K. Starmer, "Positive Obligations under the Convention" in *Understanding Human Rights Principles*, ed. J. Lowell and J. Cooper, (Hart Publishing, 2001), p. 146–147.

[45] Compare Steven Greer, 'Europe', in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, David Harris, 3rd ed, (Oxford University Press, 2018), 441–465, p. 441–447.

[46] Stoyanova (2023b) p. 10.

[47] Compare *Budayeva and Others v. Russia*.

[48] Lavrysen (2016) p. 11; Compare *M.C. v. Bulgaria*, no. 39272/98, 4 December 2003, paras. 148–153.

Over the years this development has given rise to more and more detailed positive obligations that the states must fulfil. This incremental advancement is commonly called the living instrument doctrine and is seen as one of the most important tools of the ECtHR in keeping the Convention up to date and able to tackle problems not envisaged at the drafting of the Convention.[49] The Court however is somewhat limited in its ability to reinterpret the obligations connected to the different rights. Being a court and operating as such its assessment is backwards looking, only determining obligations after having decided a breach has occurred.[50] The aims of constantly evolving the interpretation of the ECHR are to assure observance of article 1, to secure the rights of the Convention. Moreover, such an observance demands that the rights are kept from becoming theoretical and illusory and kept practical and effective.[51]

2.3 Finding the positive obligations

To make matters complicated there does not exist a perfect correlation between the rights and possible positive obligations. Any one right can give rise to several obligations and those obligations can in turn be achieved in various ways in accordance with the states margin of appreciation in the particular area.[52] In addition not even action contrary to domestic law necessarily violates a connected positive obligation as long as other protective actions have been taken. As a result, each case of a possible violation must be examined in detail to ascertain if the state has taken appropriate action.[53] Let us say that a risk of a mudslide that will threaten people's lives has been established. The domestic legal system demands evacuation is such cases. Instead, the government avoids the mudslide through adaptive action. The threat to life was averted. The fact that such actions were in breach of domestic law is irrelevant in this particular case since the obligation to protect life was achieved. The same would have been true for several other kinds of actions the state could have taken.

In choosing what measures to take the state thus has some leeway. In comparison with what measures must be chosen regarding negative rights, the least intrusive measure must be taken. Actions taken to perform positive obligations are less decided. Moreover, it does not even have to be the most

[49] *The European Convention on Human Rights – A living instrument*; *Tyrer v. United Kingdom*, para. 31.

[50] Stoyanova (2023b) p. 10–11; *The European Convention on Human Rights – A living instrument*, p. 7.

[51] J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, (Manchester University Press 1993), p. 102–103.

[52] M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012), p. 88–89.

[53] Johan Vorland Wibye, 'Beyond Acts and Omissions–Distinguishing Positive and Negative Duties at the European Court of Human Rights: Human Rights Review', *Human Rights Review* 23, no. 4 (1 December 2022): 479–502.; compare *Budayeva and Others v. Russia*, paras. 134–136; compare *Hatton and Others v. United Kingdom*, para. 123.

protective of the intended right.[54] Furthermore a failure of the state to act is only relevant if there existed an obligation to act in the first place. Additionally, such an omission must be shown to be wrongful. To determine the wrongfulness three elements must be further examined. In order these are state knowledge, causation, and reasonableness and will be further investigated below.[55]

Regardless there are several separately distinguishable obligations that can be generated in certain situations. They are generally designated in terms of their content. Content in this context refers to the measures a state should take or have taken. The obligations also have a scope which consists of how much is required to fulfil them.[56] The scope is in turn decided by the previously mentioned factors of causation, state knowledge and reasonableness.[57] In accordance with above criteria the ECtHR has identified three types of positive obligations.[58] The first one is procedural in nature and pertains to the demands that an effective investigation be done upon sufficiently proven claims of harm. The other two obligations are of a substantive nature. The first being the obligation to adopt an effective regulatory framework with procedural guarantees. This obligation is aimed at the general public and intended to thwart wider scale harm. The second one is aimed at a specific individual at threat and it aims to ensure that protective operational measures are taken in such circumstances.[59] The focus of the thesis will be on the latter two substantive obligations.

2.3.1 State knowledge

Moving on to the first element of wrongful state action. State knowledge is of paramount importance to hold any state responsible for failing in their positive obligations.[60] For a foundation of state knowledge the draft convention ARSIWA can be studied. Article 1 concludes that "Every internationally wrongful act of a State entails the responsibility of that State".[61] In turn article 2 characterises an internationally wrongful act as an action or omission that is either attributable to the state under international law or constitutes a breach of the state's international obligations.[62] As this thesis is investigating positive obligations the omission is of certain interest. In the commentary to the article, it is made clear that these situations can be confusing in so as to the

[54] C. Dröge, *Positive Verpfl ichtungen der Staaten in der Europäischen Menschenrechtskonvention* (Springer-Verlag, 2003), p. 334.

[55] Lavrysen (2016) p. 131–132, 137–138, 159–163.

[56] Ibid, p. 131; Stoyanova (2023b) p. 18.

[57] Stoyanova (2023b) p. 18.

[58] Starmer (2021) p. 146–147; Compare with Lavrysen (2016) p. 45–47. Lavrysen is critical of Starmer's categorisation, seeing many of them as similar to the point of being the same, reducing the number of different obligations to three.

[59] Stoyanova (2023b) p. 18–19.

[60] Lavrysen (2016) p. 134.

[61] ARSIWA, article 1.

[62] ARSIWA, article 2.

isolation of the omission, from the other important circumstances surrounding the act.[63]

Examples of such circumstances are fault and knowledge. Both can be used in the ECHR system in order to find a breach of a positive obligation. Knowledge in turn constitutes a part of fault and is explained as awareness of a risk of harm, the fault then laying in not taking the required action to avoid that harm.[64] Also relevant is negligence, another element of fault. For responsibility a state should have known or ought to have known about the risk.[65] "Should have known" signifies actual knowledge while "ought to have known" signifies negligence. Negligence thus encompasses situation where the state did not know about the risks but would have if it had conducted itself properly.[66] To test if a state can be held responsible for an omission a comparison is made between the state action and what action could be legitimately expected from a diligent state. Keeping in mind of course that the state merely acts through its agents.[67]

2.3.1.1 What happens when state knowledge is proven?

As stated, the Court has decided that the demanded level of state knowledge is that the state must have known or ought to have known that a risk of harm existed.[68] Yet what happens if this bar is reached? That depends on what the direction the discovered harm has. Is it pointed at a specific individual or the general population?

If a threat is directed at a particular individual, then that knowledge activates the positive obligation to take what are called protective operational measures in order to ensure that the harm does not actualise.[69] Even if an obligation is triggered however, it does not necessarily give rise to a breach. The ECtHR decided in *Osman v. the United Kingdom* that such a burden would be too demanding on a state. The obligation to take protective operational measures cannot be construed so wide that it imposes an impossible or disproportionate burden on the authorities.[70] Thus to prove a breach an applicant must show that the authorities did not do all that could be reasonably expected of them

[63] ILC Draft Articles Commentary, *Article 2. Elements of an internationally wrongful act of a State*, para, 4.

[64] Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press, 2022).

[65] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, 17 July 2014, para. 130, *Mastromatteo v. Italy,* para. 68

[66] Stoyanova (2023b) p. 23.

[67] ILC Draft Articles Commentary, *Article 2. Elements of an internationally wrongful act of a State*, para, 5; Stoyanova (2023b) p. 22–23.

[68] Compare *Centre for Legal Resources on behalf of Valentin Câmpeanu v.* Romania, para. 130, *Mastromatteo v. Italy,* para. 68.

[69] Compare *Eremia v. The Republic of Moldova*, no. 3564/11, 28 May 2013, para 56; *Gorovenky and Bugara v. Ukraine*, nos. 36146/05 and 42418/05, 12 January 2012, para. 32; *Mastromatteo v. Italy*, para. 68.

[70] *Osman v. the United Kingdom* [GC], no. 23452/94, 28 October 1998, para. 116.

to avoid a real and immediate risk to life of which they have or ought to have knowledge. Due to the many complex questions surrounding what actions have and have not been taken each case needs to be examined individually.[71] To add further complexity the knowledge the state had or should have had and how accurate that knowledge was can also play a role in determining if there has been a breach.[72]

If the potential harm is pointed at the general populace the situation is somewhat different. Instead of knowledge of a threat activating the obligation the Court has stated that this obligation arise when any activity capable of threatening the right to life is conducted.[73] The source of that harm seems to be less important and can be both the state and private parties.[74] The primary substantive positive obligation that the state must fulfil is to put in place a regulatory framework intended to govern the dangerous activity and keep it as safe as possible.[75] The framework must be able to deal with every activity and take into account all particular peculiarities of that activity during the entire operation of said activity.[76] Moreover, taking practical measures to effectively protect endangered citizens must be made compulsory to those concerned. To achieve the latter procedures must be put in place to find any shortcomings with the process and errors made by those responsible at different levels.[77] Lastly the ECtHR has put extra emphasis on the public's right to information regarding these dangerous activities.[78] This might seem like quite an extensive list of things that the state is required to accomplish. Yet as with risk aimed at a particular person there exists a caveat. The scope of the actions expected of the state cannot place an impossible or disproportionate burden on the authorities.[79] Furthermore, the state has a margin of appreciation as to the specifics of fulfilling its obligations.[80]

There are however also circumstances where these two categorisations meet. If an individual is found to be at risk, the taking of protective operational measures can be severely hampered if the framework for ensuring protection is inadequate.[81] A state is dependent on effective administration to function properly and efficiently. If the frameworks intended to regulate the taking of measures does not function well then neither will the state response.[82]

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[71] *Osman v. the United Kingdom*, paras. 115–116.
[72] Stoyanova (2023b) p. 25.
[73] *Cevrioğlu v. Turkey*, no. 69546/12, 4 October 2016, paras. 50–51.
[74] *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004, para. 71.
[75] *Öneryıldız v. Turkey*, para. 89.
[76] *Cevrioğlu v. Turkey*, para. 51.
[77] *Öneryıldız v. Turkey*, para. 90.
[78] Compare *Budayeva and Others v. Russia*, paras. 129–132.
[79] *Budayeva and Others v. Russia*, para. 135; *Cevrioğlu v. Turkey*, para. 52.
[80] *Budayeva and Others v. Russia*, para. 134–135; *Cevrioğlu v. Turkey*, paras. 52, 55.
[81] Lavrysen (2016) p. 115–116.
[82] Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Routledge 2012), p. 209.

2.3.1.2 How to assess state knowledge?

There are several ways the Court can determine that a state had or ought to have had knowledge of a potential harm. A clearcut way is to look at if the state has acted in any way pertaining to the harm. Has legislation been put in place or have permits been given that can be related to the risk? If so, knowledge can be most likely be proven.[83] Other ways include available objective scientific research or various reports conducted nationally.[84] Moreover if an activity is intrinsically dangerous then it is expected that the state takes actions to monitor it, thus making it more certain knowledge will be found.[85] Therefore, for the purpose of establishing a regulatory framework, the demands on knowledge are not very high. In many cases state knowledge of a general problem is more or less assumed.[86] For an obligation to take protective operational measures however the demands on knowledge are more substantial. It is not enough to know about general risks. Rather the state or its agents must know of a risk linked to a certain person.[87]

After a potential breach has occurred, it can be easy to assume that the authorities knew or ought to have known about the risks. After the risk actually materialised, it seems certain that knowledge of the risk must have been there. Yet this would perhaps be unfair to the state parties. In that spirit the Court has decided that state knowledge should be assessed from the time when a state was expected to conduct its positive obligation. No malice due to hindsight is to be applied.[88]

As to who is to carry the burden of proof concerning knowledge the Court has developed a certain jurisprudence. Who needs to prove what is dependent on the particular issue, while the bar needed to be reached to prove something is linked to the fact in each case.[89] The starting point however is that the applicant has the burden of proof.[90] Yet these rules are not set in stone. The Court has shifted the burden of proof to the state when it was deemed better placed to discharge the burden and present evidence.[91] As can be seen the court is rather flexible on this point and can chose to give the burden of proof to the party it thinks best able to bear that burden.

[83] Compare *O'Keeffe v. Ireland* [GC], no. 35810/09, 28 January 2014, para. 168.

[84] *Brincat and Others v. Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014, para. 106; *Cevrioğlu v. Turkey*, para. 68; *Öneryıldız v. Turkey*, para. 98.

[85] *Cevrioğlu v. Turkey*, para. 68.

[86] Xenos (2012) p. 82.

[87] Lavrysen (2016) p. 132–133.

[88] Compare *O'Keeffe v. Ireland*, paras. 143–152; *Vilnes and Others v. Norway*, para. 222.

[89] Tobias Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', *German Yearbook of International Law* 50 (2007): 543–588.

[90] Stoyanova (2023b) p. 32.

[91] Thienel (2007); Stoyanova (2023b) p. 32–33.

2.3.1.3 Risk of harm

Having clarified how knowledge is assessed it is now worth turning to what that knowledge is supposed to concern, the risk of harm. Once again, a distinction is made by the Court between cases of a more general obligation and the protective operational measures.

Regarding the general obligation, the Court seems to focus on the inherent danger that any activity might pose to the people around it and the state knowledge pertaining to that danger.[92] As can be seen in both *Cevrioğlu v. Turkey* and *Budayeva and Others v. Russia* the "emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives".[93] It would thus seem that as long as any activity pose any form of risk to the wellbeing of people under a high contracting state's jurisdiction then said state will have an obligation to put a regulatory framework in place. As long as the state knew or ought to have known about risk of course. There are however downsides with this angle, from the point of the applicant. As can be seen in *Fernandes de Oliveira v. Portugal* to find a breach a causal link between the harm and the omission of the state must be shown and any harm be the result of systemic shortcomings in the framework.[94] In other terms it must be proven that the regulatory framework or lack thereof operated to the applicant's detriment and that this was not incidental. This case concerned medical care. It is uncertain whether the same would be true in other cases.

For protective operational measures to be required the risk must be real and immediate.[95] The court has however neglected to conclusively specify these two terms which leads to some confusion.[96] Real seems to be interpreted more or less in its more mundane way. The ECtHR has used it in connection with objective risks, risks that will materialise and the probability that a specific risk will occur.[97] When it comes to immediate stringency is lacking. The term has been used to locate the risk temporally and put it close in time with the state's knowledge of the risk. Although it has also been used to signify that the risk was significant and continuous, dropping the temporal aspect in favour of gravity.[98] Another important factor to consider is that the Court's view

[92] *Cevrioğlu v. Turkey*, para. 51.

[93] *Budayeva and Others v. Russia*, para. 132; compare *Cevrioğlu v. Turkey*, para. 51; *Osman v. the United Kingdom*, para. 116.

[94] *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, 31 Januari 2019, para. 107.

[95] *Mastromatteo v. Italy*, para. 68; compare *Kurt v. Austria* [GC], no. 62903/15, 15 June 2021, para. 211

[96] Stoyanova (2023b) p. 34.

[97] *Kotilainen and Others v. Finland*, no. 62439/12, 17 September 2020, paras. 78–80; Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights', *Human Rights Law Review* 18, no. 2 (1 January 2018): 309–346, p. 339–340.

[98] Compare Franz Christian Ebert and Romina I. Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the

on the obligation to take action is a bit different in this case. What is assessed is not the results, but rather the attempt of the state to act. Not all states have the same means available to them and are therefore not expected to be able to face these challenges in the same fashion.[99] Nonetheless, an examination by the Court will analyse both the state's assessment of the risk and adequacy of any action taken. A failure to achieve the desired result is not in and of itself enough to find a violation of the positive obligation.[100] Lastly, in contrast with more general protective measures it can be easier to identify a causal link in circumstances pertaining to protective operational measures. Often the failure of the authorities is closer in time, more concrete and more immediate in connection to the violation, making the link extra visible.[101]

It is also necessary to briefly explain the importance of the source of the harm in question. Normally that is broadly divided into two groups, man-made and natural risks of harm.[102] The important difference between these two is the predictability of the harm. The Court has decided that different levels of predictability entail different levels of scrutiny and therefore more or less demanding positive obligations.[103] Man-made harms or dangerous activities are seen as more predictable and thus lend themselves to heightened scrutiny from the Court. Yet that scrutiny is dependent on the actual level of control the state had over the situation.[104]

As natural risks of harm are most commonly seen as less predictable, they consequently give rise to less demanding positive obligations for the states to achieve.[105] Further justification for this distinction has been that events such as natural disasters are beyond human control.[106] In relation to such hazards the idea of not giving an impossible or disproportionate burden to the states is given more weight and the threshold for what is considered disproportionate decreases.[107] The case law also seems to put further demands on the rise of positive obligation in these cases. In *Özel and Others v. Turkey* the ECtHR put up further hurdles, demanding that the natural hazard be imminent and

Osman Test to a Coherent Doctrine on Risk Prevention', *Human Rights Law Review* 15, no. 2 (1 January 2015): 343–368, p. 359; Stoyanova (2023b) p. 34–35.

[99] *Osman v. the United Kingdom*, para. 116.

[100] *Kurt v. Austria*, para. 159.

[101] Stoyanova (2023b) p. 37–38.

[102] Compare *Budayeva and Others v. Russia*; *Gorgiev v. The Former Yugoslav Republic of Macedonia*, no. 26984/05, 19 April 2012, para. 73; *Smiljanić v Croatia*, no. 35983/14, 25 March 2021, para. 67.

[103] *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012.

[104] Compare *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, 20 December 2011, para. 243; *Tagayeva and Others v. Russia*, nos. 26562/07, 49380/08, 21294/11, 37096/11, 14755/08, 49339/08 and 51313/08, 13 April 2017, para. 563.

[105] *Budayeva and Others v. Russia*, para. 135.

[106] Ibid, para. 135.

[107] Ibid, para. 135; compare *Kolyadenko and Others v. Russia*.

clearly identifiable for a breach to be found. The recurrence of the natural hazard acts an indicator that the hazard indeed was clearly identifiable.[108]

2.3.2 Causation

Above has been shown in what way the ECtHR investigates state knowledge. That is however not enough to find a breach of a positive obligation. What must also be proven is that the inadequate action or the inaction of the state in at least in part was to blame for the events the applicant is complaining about. The Court has formulated a test to find possible causation in the case *O'Keeffe v. Ireland*. The state will be held responsible if it fails "…to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm".[109] Subsequently, if the state could have taken any action that might have affected the outcome in positive way, but failed to do so, the test will be answered in an affirmative manner. Yet what the test also makes apparent is that mitigation and avoidance of the harm are interchangeable alternative approaches, giving some flexibility as to what action is required.

2.3.2.1 How to attribute an act or omission to the state

As previously stated, the state is not an individual and thus can only act through its agents.[110] In order to show causation of the state's doings it is helpful if the actions of the agent who in actuality conducted them can be attributed to the state. To see when this is the case we can once more turn to ARSIWA. As can be seen in article 4-6 the internal organs that a state can be held responsible for are the actual state organs and those de facto acting as such.[111] When attribution is shown it is most often easier to show a causal link. Or at least that is the case when dealing with state actions. It is another question when dealing with omissions.[112] Attribution is not demanded by the Court to prove a breach of the positive obligations of a state. Yet proving it can be very useful in cases concerning the more complex violations through omissions. Or as Stoyanova put it.

> … it is still relevant to engage with attribution since the rules of attribution under international law articulate lines of proximity. They express relationships of directness and immediacy between the act of the state and the harm. It is meaningful to consider the justifications and the theoretical underpinnings of these

[108] *M. Özel and Others v. Turkey*, nos. 14350/05, 15245/05 and 16051/05, 17 November 2015, para. 171; compare Stoyanova (2023b) p. 39.

[109] *O'Keeffe v. Ireland*, para. 149.

[110] Compare ARSIWA, articles 4–6; ILC Draft Articles Commentary, *Article 2. Elements of an internationally wrongful act of a State*, para, 5.

[111] ARSIWA, articles 4–6.

[112] Stoyanova (2018) p. 318.

> relationships, so that we better understand the linkages between harm and state conduct in the form of omission.[113]

As can be seen the value of using the more common rules of attribution lie in outlining the intricate web of actions and inactions by various state agents that make up a violation via omission. In addition to direct agents the state can also be held responsible for the action of individuals or groups that it exercises control over.[114] As this will not be relevant for the thesis this will only be glossed over. Suffice to say that more control tends to translate into closer proximity between state and harm, consequently increasing the extent and demand of the positive obligation. According to the Court's case law states are assumed to have control over their territory and thus are obliged to obey the obligations domestically.[115]

Another way of possibly proving causation is to look at the domestic law of the state in question. If internal law regulates or demands a certain conduct and the authorities deviated from said conduct, then it is much easier for the Court to find causation between the omission and harm. The Court has decided to assume that national regulation is there in order to prevent harm from materialising.[116] The way it works is rather simple. The domestic regulation demanding state action acts as foundation or baseline for what the population can expect. Deviating from this baseline makes it easier to argue that such a deviation caused the harm.[117] To make matters more complicated however it is possible to follow every paragraph of domestic law and still fail to live up to the positive obligations demanded by the Convention. The reason being that the legal framework itself can be deficient and as such, not demanding enough or the right action from the state.[118] Adding further complexity, failing to fulfil positive actions demanded by domestic law is not enough to definitely prove a violation as the ECtHR in the past has decided to further investigate such matters.[119] Domestic legality thus acts as a possible guideline to see if causation exists rather than immediately showing it.

2.3.2.2 The effect of the source of the harm

Moreover, the court has also taken note of the source of the harm when establishing causal links. Here, as in the investigation about knowledge, a

[113] Stoyanova (2018) p. 320.

[114] ARSIWA, article 8.

[115] Compare *Sargsyan v. Azerbaijan* [GC], no. 40167/06, 16 June 2015, paras. 128–131; Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?: Social Philosophy and Policy', *Social Philosophy and Policy* 32, no. 1 (1 January 2015): 244–268, p. 253.

[116] Stoyanova (2018) p. 332.

[117] Compare *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001, para. 219; *Elena Cojocaru v. Romania*, no. 74114/12, 22 March 2016, para. 111; *I v. Finland*, no. 20511/03, 17 July 2008, para. 44.

[118] Stoyanova (2018) p. 334.

[119] Compare *Fadeyeva v. Russia*, no. 55723/00, 9 June 2005, para. 92; *Panaitescu v. Romania*, no. 30909/06, 10 April 2012, para. 36.

difference is made between man-made harms,[120] and natural ones.[121] Since the positive obligation to regulate all dangerous activities, regardless if they are private or public, is so vast it is simpler to determine if a link is present. These activities are supposed to be controlled and regulated. Any omission leading to a failure in this respect is enough to establish a causal link.[122]

The opposite is true when it comes to natural risks of harm. As with proving state knowledge, it is more difficult to confirm causality. In *Budayeva and Others v. Russia* the ECtHR made clear that natural disasters are to be seen as beyond human control and therefore do not give rise to equally demanding positive obligations.[123] Yet a scale of the obligation does exist as the Court also states that each case must be investigated individually with special attention given to the domestic legality of the authority's acts or omissions, the domestic decision-making process including the appropriate investigations and studies, and the complexity of the issue.[124] It continued to state that such considerations ought to be taken if the natural hazard was clearly identified as imminent. Further the scope of the obligation is dependent on the origin of the threat and to what extent it can be mitigated. Here too no impossible or disproportionate burden can be imposed on the authorities .[125]

2.3.2.3 Causation without responsibility

Even though causation might be present, the court does not always find a violation. Once again both the reasonableness standard and the real and immediate test are used to assess causation. Moreover, the violation must be part of a systemic error in state action.[126] Following three standards are not cumulative or used together, but rather exemplifies the different ways in which the ECtHR has limited state responsibility.

Beginning with reasonableness it has been shown in the case law that even when a direct causal link between the state action and the harm can be shown the standard can still exonerate the state from responsibility. A clear example can be seen in *Mastromatteo v. Italy*. The case concerned the killing of a man by individuals who had been granted temporary leave from prison or benefitting from similar semi-liberty circumstances.[127] The causal link is clear to see in this case. Had the Italian authorities not granted the perpetrators leave from prison the killing could not have taken place. A distinct state act undoubtedly was part of causing the harm. Yet the Court did not deem that enough and acquitted Italy of responsibility.[128] Citing *Osman v. the United Kingdom* the

[120] Compare *Öneryıldız v. Turkey*.
[121] Compare *Budayeva and Others v. Russia*.
[122] *Budayeva and Others v. Russia*, paras. 131–132; *Öneryıldız v. Turkey*, para. 71.
[123] *Budayeva and Others v. Russia*, paras. 135, 174.
[124] Ibid, para. 136.
[125] Ibid, paras. 135–137.
[126] Stoyanova (2023b) p. 67–68.
[127] Compare *Mastromatteo v. Italy*, paras. 10–29.
[128] Ibid, para. 79.

Court concluded that there needed to be a test of reasonability. To be held accountable the state must have failed to "…do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge".[129] With this foundation, and bearing in mind the other considerations of the state, it was found that judged reasonably no information existed that would have caused the Italian authorities to foresee that the release of prisoners would have led to the harm in question.[130] The result shows that a clear causal link is not enough to convict a state, a certain room of manoeuvrer is given to reasonableness.

The second way the Court uses to limit responsibility is the real and immediate risk standard. As has been state above in section 2.3.1.3 the court has not clarified what either real or immediate mean in this circumstance. Regardless, it continues to be used. The purpose of the standard in this case could also be said to be one of reasonableness to a certain extent. If not for the demands of real and immediate risk then states would be expected to answer every threat of harm that could befall their population.[131] Moreover, the limiting factor of the standard is not generally applicable. It is only relevant in cases demanding protective operational measures and those in turn require a specific individual under threat. The causality investigation of broader threats ought not to include this standard.[132]

Lastly there exists one more tool that the court utilises to limit state responsibility when causality is proven. For a violation to be found the Court must deem the failures of the state party to be systemic and not incidental.[133] What this means is basically that if a state agent through omission has caused harm that action in turn must be part of a wider set of flaws that allowed it to happen. Only then can the state as such be held responsible. Consequently, situations where state agents simply fail in their tasks or where they personally choose to act in a way that is contrary to the Convention the state is seen as blameless.[134] Once again *Mastromatteo v. Italy* can be used as an example. The Court begins its investigation by assessing the Italian system for temporary leave from prison. Finding that "…there is nothing to suggest that the system of reintegration measures applicable in Italy at the material time must be called into question under Article 2".[135] The Court however then continued its investigation concerning the perpetrators and the specific situation of their semi-custodial release, finding no fault in the actions of the authorities.[136] It

[129] *Mastromatteo v. Italy*, para. 74; *Osman v. the United Kingdom*, para. 116.

[130] *Mastromatteo v. Italy*, para. 76; compare T. R. Hickman, 'The Reasonableness Principle: Reassessing Its Place in the Public Sphere', *The Cambridge Law Journal* 63, no. 1 (2004): 166–198.

[131] Stoyanova (2018) p. 340–341.

[132] Compare Ibid, p. 341–342.

[133] Compare *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, 19 December 2017, paras. 185–196; *Mastromatteo v. Italy*, para. 73.

[134] Compare *Lopes de Sousa Fernandes v. Portugal*, para. 187.

[135] *Mastromatteo v. Italy*, para. 73, see also paras. 69–72.

[136] Ibid, paras. 74–79.

would thus seem that this way of limiting responsibility is most relevant when the regulatory frameworks are investigated. This standard is also not used when the investigation pertains to criminal legislation because it is assumed that criminalization ensures better protection of human rights.[137]

What can be seen is that the ECtHR must perform a balancing act, especially regarding reasonableness and the real and immediate risk standard. The Court seems to continuously oscillate between wanting to ensure effective protection of the one hand, and not impose impossible or disproportionate burdens on the other.[138] Moreover, the differing terminology used in the jurisprudence makes it difficult to establish a definitive standard of required causality, thus reducing the foreseeability of the Court's decisions.[139]

2.3.3 Reasonableness

Reasonableness is the final element of a case concerning positive obligations in need of examination. As has been seen above it constitutes parts of the other elements, but in this context, it is a broader and independent investigation encompassing the entire case. The Court has concluded that states are limited, both in their knowledge and their resources.[140] Sometimes choices have to be made between competing interests and sometimes the prioritisation of one right might infringe on the fulfilment of another one.[141] All these wider state interests must also be balanced against the interests of the applicant.[142] This test of reasonableness has been framed in various ways but can be summed up as follows. When fulfilling their positive obligations states are only expected to take reasonable steps to prevent harm that they had knowledge about, and which do not impose impossible or disproportionate burdens upon the states.[143]

Regarding interests protected under article 8 a slightly different test is used, the so called "fair balance" test. Instead of examining the state action through the previously stated criteria it is examined weather or not a fair balance was achieved between the interests of the individual and the community.[144] Yet that test is conducted when the matter of the case concerns the right to private

[137] Compare *M.C. v. Bulgaria*, paras. 167–187; *Siliadin v. France*, no. 73316/01, 26 July 2005, paras. 90–134.

[138] Lavrysen (2016) p. 140.

[139] Compare Ibid, p. 140.

[140] Compare for example *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, para. 132; *Mastromatteo v. Italy*, para. 74; *O'Keeffe v. Ireland*, para. 144.

[141] *Dodov v. Bulgaria*, no. 59548/00, 17 January 2008, para. 102; *Ilia Petrov v. Bulgaria*, no. 19202/03, 24 April 2012, para. 64; *Kapa and Others v. Poland*, no. 75031/13, 14 October 2021, para. 163; *Mosley v. United Kingdom*, no. 48009/08, 10 May 2011, para. 121; *R.R. v. Poland*, no. 27617/04, 26 May 2011, para. 155; *Öneryıldız v. Turkey*, para. 107.

[142] Hickman (2004).

[143] Compare *Budayeva and Others v. Russia*, para. 135; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, para. 132; *Cevrioğlu v. Turkey*, para. 52; *O'Keeffe v. Ireland*, para. 52; *Öneryıldız v. Turkey*, para. 107.

[144] *Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014, para. 65.

life in article 8 in conjunction with the freedom of expression in article 10. In those cases it is the job of the state to ensure that a fair balance between these rights is struck.[145] The right to health that will be examined in this thesis is more of an amalgamation of the rights expressed in article 8 and 2 as the Court has created to ensure some protection for that right, despite it not being present in the Convention.[146] With respects to this mixing of rights and the obligations demanding that states "take appropriate measures to protect the life and health of those within their jurisdiction",[147] it is likely that the test of reasonableness connected to the right to health would be similar the one concerning right to life.[148] It is also possible that the demands of the test are set even lower concerning the right to health. In *Vilnes and Others v. Norway* the Court seems to have used the low hurdle of "might conceivably have helped".[149]

In its assessment, regardless of which test is used, the ECtHR consider a multitude of aspects relevant to the effective governing of a state and the weighing of different interests. These include public interests as expressed in article 8.2, but also in wider sense encompasses public policy considerations and budgetary concerns.[150] In that spirit cost-effectiveness and how to manage resources are also evaluated.[151] Moreover, more general practical obstacles and the various interest and consequences are investigated.[152] As such the distinguishing factor of this test of reasonableness and the prior ones is that this one encompasses far more. It incorporates all the choices that must be made in a state when it comes to societal values, priorities, and resources. The case law has shown that the list of relevant factors can be expanded to include almost anything that could be relevant to determine reasonableness.[153] The important fact seems to be that the action taken should adequately protect the intended right.[154] Yet often the Court also leaves out things that have been seen as relevant before. What factors that are considered relevant at a particular time is often not elaborated upon making the standard flexible for the Court to use as it wishes.[155] This flexibility has been criticised by McHarg

[145] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, 27 June 2017, para. 77; Compare *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, 7 February 2012, paras. 104–107.

[146] Compare *İbrahim Keskin v. Turkey*, no. 10491/12, 27 Mars 2018, para. 61.

[147] *Vavřička and Others v. the Czech Republic*, nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, 8 April 2021, para. 282.

[148] Compare *Brincat and Others v. Malta*, especially para. 101–102, for further context consult paras. 103–117.

[149] See *Vilnes and Others v. Norway*, para. 244.

[150] *Kapa and Others v. Poland*, para. 163.

[151] *Öneryıldız v. Turkey*, para. 107.

[152] Compare *Dodov v. Bulgaria*, para. 102; *Evans v. the United Kingdom* [GC], no. 6339/05, 10 April 2007, para. 77; *Mosley v. the United Kingdom*, para 121.

[153] Lavrysen (2016) p. 165.

[154] Compare Ibid p. 162. A discussion is had about the different terms the Court has used to describe reasonable action. For the purpose of this thesis they are brought together under either "adequate" or "reasonable".

[155] Compare Stoyanova (2023b) p. 75.

saying "However, a human rights court needs to be able to point to a firmer theoretical foundation for its claim to legitimacy than simply the reasonableness of individual decisions, since these are judgments with which observers may or may not agree."[156] As McHarg makes clear this ambiguity can make it seem as if the decisions of the Court are somewhat arbitrary. This becomes especially true as the reasonableness standard permeates much of the investigation, including the other criteria.

Important to keep in mind is also that these sort of considerations in and of themselves bring about a tension of values. Since the investigation at a certain point must make decisions about what is reasonable, a stand must be made between the opposing values of individual freedom and protection. In many cases an increased protection of one right entail decreased freedoms of another.[157] In turn this means that increased protection can mean a more intrusive state, which might not be desirable.[158] On the other hand, a more relaxed state might not do enough to keep certain freedoms in check, thus letting them limit other people's rights.[159] A good example of this tension can be found examining on one hand the freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8. One person's freedom of expression might limit another person right to respect for private life. It is up to the ECtHR to decide where the balance ought to lie.[160] Thus the role of the Court in these circumstances is to assure that these interests are kept in balance so that people are well protected, without encroaching too much on other interests.[161]

2.3.3.1 The effect of the reasonableness standard on state knowledge and causation

As has been alluded to before, reasonableness is assessed at several different stages during an investigation.[162] Aside from these more specific versions of the standard the more general and overarching variant can also affect how the Court looks at state knowledge and causation.[163] Yet trying to separate the different kinds of reasonableness is important. If a state has lacked knowledge of a harm, demanding positive obligations from it would make little sense, regardless of how reasonable and simple these actions may have been.[164] In a

[156] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review* 62, no. 5 (1 September 1999): 671–696, p. 696.

[157] Stoyanova (2023b) p. 74.

[158] Compare Ibid, p. 80.

[159] Compare Ibid, p. 74.

[160] See for example *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, para. 77; *M.L. v. Slovakia*, no. 34159/17, 14 October 2021, para. 34.

[161] Compare Lavrysen (2016) p. 168.

[162] Compare for example *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, para. 132; *Mastromatteo v. Italy*, para. 74; *O'Keeffe v. Ireland*, para. 144.

[163] Stoyanova (2023b) p. 75.

[164] Compare *Mastromatteo v. Italy*, paras. 69–79; compare *Van Colle v. the United Kingdom*, no. 7678/09, 13 November 2012, para. 96.

similar fashion the very reasonable actions that a state could have taken might have had no effect on the relevant harm, showing a lack of causality.[165] The term "reasonable" used by the Court is by its nature somewhat arbitrary,[166] and can affect the determination of the other standards both in a way that increases and reduces demands on state parties. Even though there are clear reasons to keep the analysis separate the ECtHR intertwines them, that too for good reasons. Following part will attempt to explain this complex intertwinement.

Beginning with state knowledge it must be said that what is known at any given time is important in determining what a reasonable reaction ought to be. If a state knows that a flood is coming and will hit a village a reasonable action would be, for example, to evacuate the village. However, circumstances might change in an unexpected way. Let us say that the flood is diverted by an accompanying mudslide with the effect of it hitting another village. The needed action would be to have evacuated that village. Since the state lacked knowledge of the mudslide though it might not be a reasonable thing to expect.[167] On the contrary if a state has extensive knowledge about a potential harm, it can imply that the expected action needed to fulfil the positive obligation become more demanding.[168]

Moreover, the real and immediate risk test need to be looked at through the lens of reasonableness as well. As indicated the test must be answered in the affirmative for any obligation pertaining to a single threatened individual to arise.[169] When that has happened, specific action is required to limit harm. This action can in some cases be intrusive. If harm nonetheless occurs, then proving causality is less demanding.[170] It would most likely be seen as unreasonable to demand that state parties take such actions when the test of real and immediate risk has not been fulfilled. Acting with the intention to protect a non-specified group of people would be costly and difficult.[171] Instead the obligation states have to the general populace is fulfilled by putting a legal and administrative framework in place. In contrast with protective operational measures, the demands on causality if harm occurs would probably be higher because of the lack of immediacy of the harm.[172]

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[165] Compare *L.C.B. v. the United Kingdom*, no. 14/1997/798/1001, 9 June 1998, paras. 39–40.

[166] Compare Lavrysen (2016) p. 159–166.

[167] Compare John H. Knox, 'Linking Human Rights and Climate Change at the United Nations Symposium', *Harvard Environmental Law Review* 33, no. 2 (2009): 477–498, p. 478.

[168] Compare *Budayeva and Others v. Russia*, paras. 134–137; Stoyanova (2023b) p. 75–76.

[169] *Osman v. the United Kingdom*, paras. 115–116

[170] Compare Stoyanova (2023b) p. 37–38.

[171] Compare *Kurt v. Austria*, para. 159.

[172] Compare Stoyanova (2023b) p. 79–80.

As to causation the use of reasonableness is also multifaceted. In some cases, the Court has utilised the reasonableness standard to reduce the demand on the causal link between state action or omission and harm. In *Vilnes and Others v. Norway* the Court found a violation of article 8.[173] In the case companies kept diving tables secret from both other companies and their own divers and the state accepted the situation. Consequentially several divers were harmed.[174] It was enough to have established that demanding the companies to disclose their diving tables could "… conceivably have helped to eliminate sooner the use of rapid tables as a means for companies to promote their own commercial interests, potentially adding to the risks to divers' health and safety".[175] The Court thus set a very low threshold for reasonableness and this in turn outweighed the tenuous causal connections. It would not have been a burden on the state to demand the diving tables be shared with the divers, failing to do so amounted to a violation.

Yet as have been seen in previous sections the opposite can also be true. The causal link in *Mastromatteo v. Italy* is obvious, but still the Court found no violation.[176] The reason was a mix of state knowledge and reasonableness. The Court deemed that Italy had no way of knowing that the perpetrators on prison leave would conduct the crime that led to harm. In the light of that conclusion, it was decided that Italy had not failed to do all that could reasonably be expected, even though it was undoubted that A. Mastromatteo would not have been killed had the perpetrators been kept in prison.[177]

2.3.3.2 Alternative measures

In order to determine what is a reasonable measure it is often necessary to decern what different actions could have been taken.[178] By comparing the actual state conduct and its effect with the list and the effects of those actions it can be determined if the state acted in a reasonable manner or if more or less state intervention would have sufficed.[179] Bearing this in mind, what action to take still primarily falls within the margin of appreciation of the high contracting parties. The conception will be further elaborated upon in the next

[173] *Vilnes and Others v. Norway*, paras. 244–245.

[174] Ibid, paras. 233–245.

[175] Ibid, para. 244.

[176] *Mastromatteo v. Italy*, paras. 10–29 and 74.

[177] Compare *Mastromatteo v. Italy*, paras. 74–79.

[178] *Kurt v. Austria*, para. 192; Compare *Cevrioğlu v. Turkey*, para. 55; *Fadeyeva v. Russia*, para. 92; *Panaitescu v. Romania*, para. 96. In these cases the Court states that the measure chosen to fulfil a positive obligation is within the margin of appreciation of the state and that states could fail to achieve the standards set out in domestic law and still fulfil the obligation.

[179] Stoyanova (2023b) p. 81–82; Compare Eva Brems and Laurens Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review* 15, no. 1 (1 March 2015): 139–168.

section. Consequently, the potential valid conduct of the state becomes wider and the ways in which a positive obligation can be fulfilled increase.[180]

The normal standard of proof when assessing cases under article 2 is that the applicant must show "that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge".[181] Although this standard at first might seem rather harsh against state parties, it is important to remember that here too exists a demand on reasonableness.[182] As a result there are still several ways to fulfil a positive obligation, with the number varying from case to case. As long as it can be shown that the conduct was within this approved group a state can escape responsibility.

The natural question to ask following this is then who it is that should carry the burden of proving or disproving the wrongdoing or that there existed alternative measures The Court has not been to clear on the matter. The case law suggests that the primary duty to suggest alternate actions falls upon the applicant, with the state then being expected to explain why the suggested actions were not taken.[183] As these cases more often than not deal with omissions it is understandable that such an order has been established since the omission only becomes visible after the harm occurs.[184] As the Court moves from determining whether a general obligation to protect life exist, to analysing what that obligation entails in the specific case the obligation moves from being abstract to concrete.[185] By assessing the circumstances in the case it is decided what actions would have sufficed and thus needed to be undertaken. Except the triggering of a prima facie duty, the process under article 8 is similar but the specific obligation often ends up being more concrete.[186]

2.3.3.3 Margin of appreciation

States in the ECHR system enjoy a certain leeway when it comes to their actions due to the subsidiary nature of the ECtHR.[187] The Court has conceded that in many cases domestic authorities are best placed to safeguard human rights within their own borders.[188] In turn this is linked to the principle of margin of appreciation. For the sake of this thesis, it can be described simply

[180] Compare *Cevrioğlu v. Turkey*, para. 55; *Hatton and Others v. United Kingdom*, para. 123.

[181] *Osman v. the United Kingdom*, para. 116.

[182] Compare *Mastromatteo v. Italy*, para. 68.

[183] Thienel (2007).

[184] Compare *Budayeva and Others v. Russia*, para. 156; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, para. 140; Stoyanova (2023b) p. 83–84.

[185] Stoyanova (2023b) p. 84–85.

[186] Ibid p. 84–85.

[187] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, International Studies in Human Rights: 99 (Nijhoff, 2009), p. 236, 257–264.

[188] See for example *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, 15 November 2016, para. 175.

as the headline used by the Court to delimitate how much freedom a state has in choosing how to fulfil positive obligations. In actuality it translates into how much rigour is used when applying both the fair balance and reasonableness tests.[189] A wider margin of appreciation entails less scrutiny while a smaller one causes the opposite.[190] In principle what action to take to complete positive obligations always fall within the margin of appreciation of the state however.[191]

Certain factors affect how wide the margin of appreciation becomes and these factors can also vary from right to right. Beginning with article 2, if the case involves difficult social of technical considerations, that will widen the margin.[192] When it comes to environmental dangers and other sources of harm that are more or less outside human control, this margin becomes even greater.[193] It can therefore be inferred that the foreseeability of a harm affects the margin of appreciation in these cases. Subsequently, higher foreseeability, as during dangerous man-made activities, will lead to a smaller margin of appreciation compared to for example natural disasters with lower foreseeability. When it comes to article 8, factors that can increase the margin includes lack of consensus regarding the interest at stake, especially if the case raises sensitive moral or ethical issues, and if states are required to balance interests or convention rights.[194] Circumstances that can reduce the margin in turn include when particularly important facet of an individual's existence or identity is at stake,[195] and when there exists a consensus amongst the contracting states regarding the subject.[196]

An extensive margin of appreciation limits the Court's ability to extend its investigation to anything except determining whether or not an action was sufficient or struck a fair balance. Subsequently, the question if any more effective action existed becomes irrelevant as long as the conduct performed was adequate.[197]

2.4 Section conclusion

To summarize, the ECHR rules concerning positive obligations and how they form are complex. For a state party to be held responsible it must be shown

[189] Lavrysen (2016) p. 185–189.

[190] Stoyanova (2023b) p. 90–91.

[191] *Budayeva and Others v.* Russia, para. 134.

[192] See *Hatton and Others v. United Kingdom*, paras. 100–101; *Öneryıldız v. Turkey*, para. 107.

[193] *Budayeva and Others v. Russia*, para. 135.

[194] See *Odièvre v. France* [GC], no. 42326/98, 13 February 2003, paras. 44–49; *X, Y and Z v. the United Kingdom* [GC], no. 21830/93, 22 April 1997, para. 44.

[195] *X and Y v. the Netherlands* [GC], no. 8978/80, 26 March 1985, paras. 24 and 27.

[196] For a more extensive overview of the margin of appreciation and what affects it see Lavrysen (2016) p. 189–210.

[197] Compare *Hatton and Others v. United Kingdom*, para. 123; *S.H. and Others v. Austria* [GC], no. 57813/00, 3 November 2011, para. 106.

that it had or ought to have had knowledge about a source of harm. The harm must in some way pertain to an action or inaction of the state and the obligation demanded to avoid the harm cannot be seen as an impossible or disproportionate burden. In other words, the hurdles of state knowledge, causation and reasonableness must be passed. Especially the latter one permeates the entire evaluation of cases. The Court seems to have used reasonableness to maintain a wide room of manoeuvre in its assessments and can use this element at various points to find or preclude state responsibility. This entanglement into the other elements of finding a violation however also serves to make any evaluation somewhat complicated and convoluted. Moreover, it often seems like all the three elements affect each other. A high degree of state knowledge can lessen the demands on causation and vice versa, whilst reasonableness is ever present and can both affect and be affected by the other two elements.

Further inconsistencies that make the analysis more complicated exist, such as the various ways the real and immediate risk standard has been used, the shifting burden of proof and what effectiveness would be needed by state actions to avoid responsibility. Consequently, the system can sometimes be confusing and in many cases a thorough analysis of the facts of the case is required in order to see if an obligation has been breached.

Also important to mention is the source of the harm since this in turn can influence the other elements of the investigation. Man-made dangers lead to more extensive obligations while natural hazards lead to less extensive ones because they are seen as less foreseeable. The paramount question here becomes how the ECHR system handles a man-made activity causing natural hazards? Such is often the case with climate change and the emission of GHGs where seemingly minor actions, barely seen as dangerous, add up to causing severe natural incidents.

Lastly causation becomes problematic in this situation. The ECHR was primarily formed to protect domestic populations from the actions and inactions of their respective states. With climate change the danger is a cumulative effect of global actions making it difficult to show that one’s state is causing the problems complained about. Withholding the benefit of hindsight, as the court has decreed, also makes it more difficult to prove knowledge.

The Court has created an extremely complicated system for determining when positive obligations arise and what their scopes are to be. Cases before the ECtHR are rarely simple but tend to be more straightforward than the in turn very complex problem of climate change. The question is whether or not the system is up for the task of dealing with a crisis of this magnitude.

3 Chapter 3 – Human rights in connection to climate change

3.1 Introduction

The previous chapter has explained how a substantive positive obligation is established in the ECHR system. The method can be somewhat confusing and arbitrary, but it exists and can be used. Following chapter aims to use this information to examine the main question of if the ECHR contains any substantive positive obligations connected to climate change and if so, what their content might be? In addition, it will seek to determine how they may be affected by the Paris Agreement and what their implementation could look like.

The signing of the Paris Agreement serves as a significant breakwater moment when it comes to the global community's view on climate change. It was in no way the first time the world came together to envision that climate change could be a threat. Yet it was one of the first times it was almost unanimously decided and agreed that climate change posed a large threat to humanity and Earths ecosystems. It is also the most recent and comprehensive treaty about how to combat climate change.[198] The Vienna Convention on the Law of Treaties ensures that international treaties are interpreted in the light of other relevant legal documents. This is made clear by article 31.[199] Even though the convention lacks retroactive application it denotes customary international law, thus becoming applicable to the interpretation of the ECHR regardless of its later adoption.[200] Consequently, it is very likely that the Paris Agreement will be used as a framework for any court's investigation into climate change.[201] It has further been established by the International Court of Justice that international instruments must be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[202] Indeed the Agreement has already been used as an authoritative document in climate litigation domestically.[203] It then follows that any investigation into state conduct and omission by the ECtHR ought to at the least use the Paris Agreement as a framework of interpretation or even lean heavily upon it.[204]

The first part of this analysis will establish a foundation of the available scientific knowledge about climate change, with a focus on the impacts in

[198] Voigt (2023) p. 238.
[199] VCLT article 31.
[200] VCLT article 4; *Golder v. the United Kingdom* [Plenary], no. 4451/70, 21 February 1975, para 29.
[201] Compare VCLT article 31; Voigt (2023) p. 238.
[202] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 53.
[203] Compare *Urgenda Foundation v. State of the Netherlands*.
[204] Compare Voigt (2023) p. 238.

Europe. This foundation will then be used to determine both what climate change will have for effects on the continent more concretely and how this can affect the enjoyment of human rights. Thereafter these impacts will be assessed using the elements of state knowledge, causation, and reasonableness in order to determine if there exist any obligations to either adapt to the effects or mitigate the causes. In this latter part the Paris Agreement will be continuously used as a guide to see how and to what extent the content of the aforementioned obligations is informed by the agreement and what the implementation might look like, bringing up both challenges and solutions.

3.2 Scientific background

As stated in the methodology, the scientific background in this section will rely heavily on the reports of the IPCC. The reason being that the main purpose of the panel is to compile current knowledge on climate change. Resultingly these reports are some of the most extensive on the subject, [205] compiling what would otherwise be a much too vast body of research to tackle for this thesis. Furthermore, the reference in article 4.1 in the Paris agreement to "best available science" refers specifically to these reports, making it more relevant.[206] Being a part of the United Nations also ensures that this knowledge ought to have been readily available for state parties and the world as a whole. Additionally, the reports of the organ contain a summary for policy makers, making certain that information was available and both easy to digest and act upon. The analysis will focus on effects that affect either only Europe or the entire globe. Although climate change impacts several different constituents of the Earth's biosphere,[207] the background will forego those lacking any direct impact on humans. The ECHR is an anthropocentric document, requiring that the harm be connected to humans in one form or another.[208] Even if the potential loss of other species, such as bees, would in turn make life more difficult for humanity,[209] showing any form of causal connection would be far too tenuous to establish a positive obligation. Consequently, most of the impacts brought up have a direct impact on humans.

A starting point is that in the scientific background, certain words describing likelihood and confidence in the expressed findings will be used. Words describing this will be in *cursive*. This is the IPCC's own method and will be used in their manner throughout the background.[210] The latest report of the

[205] IPCC, 'About — IPCC', accessed 31 October 2023, https://www.ipcc.ch/about/.

[206] Voigt (2023) p. 240.

[207] Compare for example AR6, p. 46 and 49.

[208] See for example ECHR article 1 and 34. Especially the reference to "individual" in article 34 makes it clear that the focus on the document is humans. Furthermore, the reference to the Universal Declaration of Human Rights (UDHR) in the preamble cements this since the UDHR according to its text cements the rights for the "human race". Also compare Mayer (2021) p. 425.

[209] CC2022, p. 739–740.

[210] For reference of what the various words describing likelihood and confidence mean see CC2022, p. 38 footnote 62.

IPCC gives us the most up to date knowledge about climate change and was published in 2023. It provides a grim picture both regarding changes that already have occurred and future ones.

3.2.1 A warmer world

Many changes to our world have already materialised. Most obvious is an observed increase in temperature. The period between 2011–2020 was on average 1,1°C warmer than the average measured in the years 1850–1900. The change is attributable to human activities and predominantly the release of GHGs.[211] With *medium confidence* it has been established that the warming during the last 50 years is the fastest recorded in at least 2000 years.[212] The warming is the root cause of the observed changes, and their impacts are many. To use the words of working group II in their contribution to AR6.

> Our current 1.1°C warmer world is already affecting natural and human systems in Europe (*very high confidence*). Since AR5, there has been a substantial increase in detected or attributed impacts of climate change in Europe, including extreme events (*high confidence*). Impacts of compound hazards of warming and precipitation have become more frequent (*medium confidence*). Climate change has resulted in losses of, and damages to, people, ecosystems, food systems, infrastructure, energy and water availability, public health and the economy (*very high confidence*).[213]

As can be seen the current consequences of a warmer world are felt over the globe in several areas and systems, causing harm to people and the systems vital for their wellbeing.

3.2.2 Increased heat and its effects

Let us then delve deeper into a few of the above effects, beginning with those immediately connected to the increased heat. It is now *virtually certain* that heatwaves and other heat extremes across the world have increased as a result of climate change and that change can with *high confidence* be attributed to human activities.[214] According to working group II the consequence of this for Europe have already set in and are *likely* to become a major threat. If global warming exceeds 2°C, then over half the European population will be under a very high risk of heat stress.[215] Already heatwaves are the deadliest form of weather event in Europe, having killed 70 000 people during a severe heat extreme in 2003 alone. The average is however 2700 deaths each year. Without accounting for the increasing urbanisation of Europe and assuming no further adaptation, that number is expected to rise to 30 000 a year if

[211] AR6, p. 42.
[212] Ibid, p. 42.
[213] CC2022, p. 1819.
[214] AR6, p. 46, 48.
[215] CC2022, p. 1854.

warming ceases at 1,5°C and 50 000 a year if it continues to 2°C.[216] Certain groups are particularly vulnerable to the effects of heat extremes including the elderly, children, and pregnant women.[217]

In turn the increased heat will increase the amounts of droughts. By the 2050s the number of days under water use restrictions in the UK will double and by 2100 they will have quadrupled.[218] Coupled with the droughts come a risk of affecting certain clay soils, on which houses have been built causing instability and possible collapse leading to injury and death.[219]

It has been established with *high confidence* that due to for example heatwaves conditions known as fire hazard weather, periods of time with increased heat, low precipitation as well as other factors, have become more common.[220] With *medium confidence* this has adversely affected human health in Europe.[221] Despite the increased risk of wildfires occurring, they have not become noticeably more common. In southern Europe the number of wildfires has decreased slightly and in western and northern Europe they have increased somewhat.[222] This trend is not thought to last, however. With *medium confidence* an increase in temperature of 1,5°C will increase the prevalence of wildfires. The confidence of the projection is raised to *high* if temperature increase exceeds 3°C.[223] Air pollution from wildfires have caused thousands of deaths since 2000 and if the fires become more common the death toll would rise.[224]

The increased temperatures also have the global effect of sea level rise as the polar ice caps melt. Millions of Europeans will be at risk from coastal flooding and the yearly cost of these floods is projected to increase from 1,3 billion Euros to between 13-39 Euros in 2050 depending on if global warming stays within 2-2,5°C.[225] This is expected to have an adverse effect on people's health and cause loss of life.[226]

3.2.3 Increased precipitation and its effects

Moreover, precipitation has increased over many parts of the continent. With *medium confidence* it is established that the mean annual precipitation has

[216] EEA, 2020: *Urban Adaptation in Europe: How Cities and Towns Respond to Climate Change*, Publications Office of the European Union, Luxembourg, p. 28.
[217] CC2022, p. 1860.
[218] Ibid, p. 1854.
[219] O. G. Pritchard, S. H. Hallett, and T. S. Farewell, 'Probabilistic Soil Moisture Projections to Assess Great Britain's Future Clay-Related Subsidence Hazard', *Climatic Change* 133, no. 4 (1 December 2015): 635–650, p. 636, 642.
[220] CC2022, p. 1835.
[221] AR6, p. 49.
[222] CC2022, p. 1835–1836.
[223] Ibid, p. 1836.
[224] EEA (2020) p. 46.
[225] Ibid, p. 1827.
[226] Ibid, p. 1860.

increased in all parts of Europe, with the Mediterranean region being the exception showing both an increase and decrease.[227] The direct effect of this rainfall is an increased risks of flooding alongside rivers but also in other areas. The risk of flood related hazards has increased in western Europe and the UK with 11 % each decade between the years 1960 and 2010.[228] If the trend continues and global warming reaches above 3°C the people affected by flooding are with *high confidence* expected to double.[229] Without any adaptive measure the damages that are expected from these events are expected to increase somewhere between three to sixfold depending on the amount of global warming. This becomes additionally dangerous as the majority of floods in Europe are flash floods, happening with little to no warning. Consequently they are more dangerous and more difficult to prevent with ad hoc measures, as can be seen by the over 200 dead in the 2021 floods in Belgium, the Netherlands and Germany.[230] Further compounding the issue is the fact that a large number of the urban population live in potential river floodplains that already are at a heightened risk of being flooded.[231] Cities in general are more vulnerable to flash and pluvial floods as well, since they have an increased amount of surfaces impervious to water, thus reducing natural drainage. Many cities in Europe are at extra risk because their sewer systems, that are intended to compensate for the lack in natural drainage, are older and unable to deal with floods.[232] As a result if floods hit an urban area, sewage is likely to spill out causing negative health effects.[233]

Furthermore, the increased rains also cause some regions to become more prone to land and mudslides causing 1,3 to 1,6 million Europeans to be at risk. In this case, as well as with both flooding and heatwaves, densely populated areas and mountainous regions seem to be most at risk, with most fatalities concentrated to Portugal and southern Italy.[234]

3.2.4 Mental health and previous knowledge

The compound effects of climate change have with *high confidence* negatively affected mental health all over the continent.[235] Extreme weather events are known to cause PTSD as well as both depression and anxiety. Often the origin of the effect on mental health is the event itself, but subsequent stresses connected to it also worsen the issue. Additionally, a sudden weather event striking without any advanced warning, thus making it impossible to prepare, can serve to exacerbate the problem further.[236] There also exist evidence that

[227] CC2022, p. 1824.
[228] CC2022, p. 1827.
[229] Ibid, p. 1820.
[230] Compare ibid, p. 1827.
[231] Compare ibid, p. 1852.
[232] EEA (2020) p. 33.
[233] CC2022, p. 1852.
[234] EEA (2020) p. 17, 33 and 38.
[235] AR6, p. 49.
[236] CC2022, p. 1863.

the increased stress of climate change and knowing that humanity and the planet stands before such a challenge can increase the risk of children developing mental health issues.[237] Mental health is not expressly protected in the Convention. In certain cases though, mental health has been protected.[238] It Subsequently, it is possible that the Court would find mental health protected in these cases. However, the protection might not be as rigorous as that of physical health or the right to life.

The above-mentioned effects, from increased heat to mental health issues, are not new and have been known by the scientific community for several years. Already in the IPCC's synthesis report from 2007 it is stated that changes are being observed and that human influence *likely* in a measurable way impacted the changes observed.[239] In the next synthesis report from 2014 this estimate has been adjusted. Then it was concluded that it was *extremely likely* that anthropogenic activity and the release of GHGs caused more than half of the thereto observed changes.[240] The observed and anticipated changes match well with the ones brought up by AR6. Higher temperatures leading to heatwaves and droughts, that in turn cause mortality rates from heat strokes to increase. Increased precipitation leading to flooding that threaten people's homes, health, and lives. The difference from AR6 is that the expressed certainty and likelihood is lower in the previous reports.[241] Moreover AR5 concludes that the changes already present with *very high confidence* were negatively affecting many human systems and revealing vulnerabilities in more. Morbidity and mortality as well as both physical and mental well-being were being negatively impacted. These impacts were consistent with a significant lack of preparedness and adaptation to climate change.[242]

3.2.5 Section conclusion

To conclude, climate change and its direct impact on humans in Europe started to show years ago and have only grown worse. Higher temperatures have led to heatwaves, droughts and possibly wildfires. Furthermore, increased rainfall led to higher risks of flooding and landslides putting millions of Europeans at risk. The already present changes are causing thousands to lose their lives prematurely or in other ways negatively impact their health. Certain more vulnerable groups such as the elderly, pregnant women and children can be identified to be more at risk when it comes to certain harms. The detailed impacts are only expected to worsen as global warming progresses. Consequently, the amount of people whose lives and health are under threat

[237] Caroline Hickman et al. 'Climate Anxiety in Children and Young People and Their Beliefs about Government Responses to Climate Change: A Global Survey', *The Lancet Planetary Health* 5 (1 December 2021): 863–873, p. 863, 871.

[238] See for example *C. v. Romania*, no. 47358/20, 30 August 2022; *Bensaid v. the United Kingdom*, no. 44599/98, 6 February 2001.

[239] AR4, p. 6.

[240] AR5, p. 4–5, 56–58.

[241] AR4, p. 33; AR5, p. 40–53; AR6, p. 42–51, 68–80.

[242] AR5, p. 53.

will only grow. In the case of heatwaves, the annual deaths are thought to become eleven times higher than the current average if we keep global warming to the agreed upon limit in the Paris Agreement.[243] In conclusion, the situation is bad and all science points to it only becoming worse as global warming continues.

3.3 State knowledge and obligations

Having read the previous section it is obvious that climate change is occurring and that it has become a problem on a global scale. However, as stated in chapter two, states are not individuals, and their knowledge cannot be determined on the same basis.[244] To stay true to the method created by the ECtHR this analysis must try to determine whether states knew or ought to have known about certain threats in the past or present, thus giving them an obligation to act. The analysis will be structured to test knowledge about the effects of climate change mentioned above that constitute a risk of harm to the populations in the signatory states of the ECHR, against the different ways of establishing state knowledge. Therefore, the analysis will look at if the European states have acted in any way pertaining to the harm. In this section focus will be on the different international commitments by the states, attempting to see if they reach the threshold of state knowledge. Further sources of knowledge in the form of objective scientific research will also be considered.[245] First however, a list of the identified potential harms and their matching potential obligations will be stipulated followed by an elaboration on the source of the potential harm.

3.3.1 Identifying the sources of harm and their obligations

The obligations brought up in this thesis will be on the general side. The Court tends to frame obligations in three levels of specificity. The first one being very abstract.[246] In the context of article 2 and the thesis the most abstract obligation is the duty to take appropriate steps to safeguard the lives of those within the jurisdiction of state parties. Primarily states need to put in place a legislative and administrative framework to effectively deter any threats to life.[247] Additionally states must take regulatory measures and adequately inform the public about any life-threatening emergency. The regulations taken must also be geared toward specific dangers in question.[248] This obligation is constantly applicable.[249] When it comes to article 8 there is no specific part

[243] Paris Agreement, article 2.1.a.

[244] See previous section 2.3.2.1.

[245] Compare *Brincat and Others v. Malta*, para. 106; *Cevrioğlu v. Turkey*, para. 68; *O'Keeffe v. Ireland*, para. 168; *Öneryıldız v. Turkey*, para. 98.

[246] Vladislava Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete', *HUMAN RIGHTS LAW REVIEW* 23, no. 3 (1 September 2023a): 1–34, p. 16.

[247] Compare *Budayeva and Others v. Russia*, paras. 128–129; *Öneryıldız v. Turkey*, para. 71, 89.

[248] *Budayeva and Others v. Russia*, paras. 130–131.

[249] Stoyanova (2023a) p. 16.

of the ECHR that guarantees the right to health, but rather this has been interpreted as a part of article 8 in conjunction with article 2.[250] This obligation too is expressed in a very abstract fashion, demanding that states "take appropriate measures to protect the life and health of those within their jurisdiction".[251] Moving any further down these levels of abstractness is difficult to do in a theoretical scenario as the Court only does this concerning rights connected to certain crimes, such as domestic violence, or when assessing a concrete case.[252] Since the Court as of yet has not passed judgment on a key case concerning climate change that will be difficult. Therefore, the suggested examples of specific actions below are nothing more than that, simple examples. The specific actions to fulfil the obligations connected to above hazards fall within a rather large margin of appreciation.[253] However the mentioned more abstract obligations still apply.

As the scientific background already focused on identifying threats to people in Europe, discerning what the potential harms are is not difficult. First there are the heatwaves. These deadly events already kill several thousands of people each year. With them projected to become increasingly common, threatening the lives and health of tens of thousands of people in Europe each year, article 2 and 8 of the ECHR will demand action.[254] The same can be said for the increasing number of floods of all various kinds. These too act as a direct threat to people's lives and health. As there are different kinds of floods projected, in cities pluvial floods will be more common and among rivers the danger will be from large volumes of moving water,[255] different kinds of measures will be needed. Moreover, the increased precipitation will also lead to an increased risk of mudslides,[256] that also must be met. These threats have rather direct counters, for example the construction of mud retention systems or dikes to fend of water. Heatwaves could also be somewhat countered by direct measures such as the use of more reflective surfaces in cities etc.[257] What these measures have in common is that they are examples of adaptation. Moreover, the planning of adaptive measures is demanded by the legally binding article 7.9 of the Paris Agreement.[258] The demand of the Agreement lends further credence to the idea that the ECHR would also require some sort of action by the high contracting states. Overall, the increased prevalence of natural hazards ought to require more extensive domestic frameworks containing action plans and legal provision aiding in dealing with the hazards. How such frameworks are formulated will be up to individual states to decide. Some guidance can be found with the IPCC and other organizations that have

[250] *İbrahim Keskin v. Turkey*, para. 61.
[251] *Vavřička and Others v. the Czech Republic*, para. 282.
[252] Stoyanova (2023a) p. 16–19.
[253] Compare *Budayeva and Others v. Russia*, paras. 134–137.
[254] EEA (2020) p. 28.
[255] CC2022, p. 1820, 1827
[256] EEA (2020) p. 31, 38.
[257] Ibid, p. 53.
[258] Bodansky (2017) table 7.1.

created lists of both possible and needed adaptation as well as adaptations already conducted.[259] These can be used as comparisons to see if state action was appropriate or lacking and as a basis to show knowledge about a particular risk of harm.

Because such a large amount of the population will be threatened by above hazards it will most likely require the creation or extension of regulatory frameworks designed to provide effective deterrence against threats to the right to life as required by Article 2 and right to health required by article 8 in conjunction with article 2.[260] Being caused by natural events the states margin of appreciation will probably be large.[261] Additionally there exist certain vulnerable groups that might require special measure for their rights to be protected. [262] Most likely those groups will still be too large to warrant protective operational measures, but cases might materialise.

When it comes to mental health problems directly connected to climate change, states are under an obligation to place the best interests of children, both individually and as a societal group, at the centre of every decision affecting their health and development.[263] It would therefore not be impossible to imagine the Court demanding some sort of action to counter bad mental health in children. Regarding other groups it might not be required since they lack the extra protection afforded to children. Stated in section 3.2.4 the protection required might not be as extensive as that under the right to life as that is expressly included in the Convention. Although not directly included in the ECHR the jurisprudence around the right to health is more extensive than that around mental health possibly meaning that that facet of health will be more worthy of protection too.

In contrast to obligations pertaining to adaptation, finding any demands on mitigation is more difficult. The difficulty is caused by the global scale of the problem. For most states, especially the smaller ones such as many European states, reducing GHG emissions would not have a meaningful impact on the world's total output and thus not noticeably improve or ensure human rights domestically.[264] To get around this problem one of three methods tend to be used. The first one is achieved by arguing for a more extensive use of many human rights treaties' extraterritorial obligations. This would be almost impossible or at least very unwise as it broadens the geographical jurisdiction too much, particularly in regional human rights systems. In so doing much of the effectiveness of those systems is lost.[265] The second way is by viewing human rights obligations as collective obligations. Proponents of this view

[259] See for example AR6, p. 92–115.
[260] Compare *Budayeva and Others v. Russia*, paras. 129, 159.
[261] Compare ibid, para. 135.
[262] CC2022, p. 1860.
[263] *Vavřička and Others v. the Czech Republic*, para. 288.
[264] Boyle (2012) p. 423–424; Knox (2016), para. 71.
[265] Mayer (2021) p. 423–424, 426–428.

use other international treaties to base their arguments. The most commonly used ones however do not lend credence to the argument, simply defining the content of state responsibility after a wrongful act has been committed and not what that act is.[266] The last method uses other-regarding obligations of cooperation as part of existing human rights treaties. It is outlined by John Knox as an obligation to cooperate broadly with other states to protect human rights from the effects of climate change. According to Knox this would entail working together to follow the goals of the Paris Agreement's article 2.1 and keep global warming below 2°C.[267] This obligation is however refuted by Mayer stating "Yet, while states certainly have an obligation to cooperate on climate change mitigation under general international law, this obligation cannot readily be characterized as a "human rights obligation."".[268] He means that states have an obligation to cooperate in the field of human rights, but not expressly on the protection of them. According to him states must cooperate under international law, but a similar obligation does not exist in human rights.[269]

Instead, he puts forth a much narrower contender, an inward-looking obligation of cooperation. With a basis in human rights treaties demanding that appropriate steps be taken to ensure human rights and the fact that large mitigation actions cannot be seen as appropriate, it is suggested that international cooperation could be either appropriate or even necessary.[270] It is inward-looking as it, in accordance with most human rights treaties,[271] only would demand action to the extent that such action would positively affect the protection of human rights domestically.[272] As can be seen in for example the Paris Agreement and the UNFCCC, states have for a long time agreed that an appropriate step to tackle the problem of climate change is international cooperation of some kind.[273] The less extensive obligation of inward-cooperation would follow the spirit laid down by above documents and still fit the demands of human rights treaties. As to the content of the obligation it would vary in accordance with how a particular state is affected by climate change and depend on which right that is invoked. Regardless, the general obligation would be one of cooperation. A state would be required to be a constructive part the international effort to combat climate change, whether that be by aiding negotiations or reducing GHG emissions. Yet the latter part, reduction, is also flexible. In the event a state lacks significant emissions or means to combat the ones it has, international efforts such as financial or technical aid could

[266] Ibid, p. 423–424, 428–430.
[267] Knox (2016) paras. 41–48, 72–75.
[268] Mayer (2021) p. 431.
[269] Ibid, p. 431.
[270] Ibid, p. 433.
[271] For the context of this thesis the example would be found in article 1 of the ECHR.
[272] Mayer (2021) p. 433, 435
[273] See for example Paris Agreement preamble, article 6–8, 10–12, 14; UNFCCC preamble.

be employed instead.[274] However, technically the obligation could stretch further in so as demanding import regulations to reduce trade of GHG intensive products. An even further step would be the imposition of sanctions on states not complying with this human right obligation, insomuch as used sanctions are in accordance with broader international law.[275]

The Paris Agreement might be of assistance in further specifying what Mayers proposed obligation could contain. To fulfil the positive obligations under article 2 and 8 a state must take all appropriate and reasonable measures to protect the life and private life of individuals inside their jurisdiction.[276] The Paris Agreement can be used to inform these two terms and give them content, to show what is an appropriate and reasonable measures in combatting climate change and its effects.[277] Even if the mitigation clause found in article 4.2 of the Agreement does not create an obligation of result it does create one of conduct. The language used in the article expresses a good faith expectation that states do in fact intend to pursue domestic measures aiming to reach their reduction goals.[278] This obligation of conduct could very much aid in giving form to what constitutes appropriate and reasonable measures. The individual goals set by the parties to the Paris Agreement, their nationally determined contributions (NDCs), are supposed to contribute to achieving the goals set out in article 2 of the Agreement, a maximum increase of 2°C in global average temperature.[279]

As seen in the IPCC reports we already are experiencing severe effects of climate change that threaten human rights at the current increased temperature of 1,1°C.[280] Moreover an increase to the minimum goal set out in the Paris Agreement of between 1,5°C to 2°C would severely increase that threat, with temperatures above that resulting in much worse consequences.[281] Thus actions set out in a country's NDC might be seen as a minimum of what can be considered appropriate and reasonable. Consequently, even though the Paris Agreement itself does not impose an obligation of results it is possible that such an obligation could be interpreted to exist by using the ECHR.[282] Combined with Mayers proposed inward-looking obligation of cooperation the content of such an obligation would of course need to be adjusted to not exceed what can be expected to achieve domestic benefits to human rights. What such an addition would do is to add another level of certainty to Mayers

[274]Mayer (2021) p. 435.

[275] Compare ibid, p. 435; Michael A. Mehling et al., 'Designing Border Carbon Adjustments for Enhanced Climate Action', *The American Journal of International Law* 113, no. 3 (2019): 433–481, p. 441.

[276] Compare *Budayeva and Others v. Russia*, paras. 128–129; *Tătar v. Romania*, no. 67021/01, 27 January 2009, para. 88; *Öneryıldız v. Turkey*, para. 71, 89.

[277] Voigt (2023) p. 244.

[278] Bodansky (2017) p. 231.

[279] Compare ibid, p. 232–233; Paris Agreement, article 4.1; Voigt (2023) p. 239.

[280] CC2022, p. 1819.

[281] Compare EEA (2020) p. 28.

[282] Compare Voigt (2023) p. 243–244.

obligation. He proposes that the content of the inward-looking obligation of cooperation is informed by the foreseeable benefits of mitigation action to specific human rights.[283] Using the models of the IPCC we can see that if the goals of the Paris Agreement are not met and GHG emissions not reduced then the damage to the right to life and health will be severe.[284] Consequently, the foreseeable benefits of successful mitigation are rather large. Moreover, by linking the obligations to the NDC states are given further autonomy in their decisions regarding how the obligation ought to be fulfilled since they themselves stipulate the actions to be undertaken in the NDC. Therefore, the margin of appreciation would be rather large and the subsidiary function of the Court would be upheld.

The penultimate cause and source of all these hazards is the global warming caused by GHG emissions. Yet seeing that as a source of harm can be problematic as will be detailed below.

3.3.2 State knowledge, climate change, and the sources of harm

Elaborating on the source of harm in this case is something of a challenge as was alluded to in previous chapter. The changes that have happened and are happening are due to human activity. The GHGs emitted through our industry, power generation and transportation are causing a global warming of the planet, which in turn leads to harmful effects.[285] Yet, as can be seen in the scientific background, these effects are expressed as different natural events. For example, an increase in rain leading to risks of flooding.[286] The ECtHR has however split these two, a source of harm can either be man-made or come from a natural event and due to their difference in predictability the obligations they give rise to differ.[287] Man-made sources mostly give rise to more concrete and extensive obligations while natural ones give rise to more abstracted and generally less extensive obligations, giving the argument that natural hazards are beyond human control.[288] Moreover any natural hazard must be clearly identifiable and imminent to give rise to an obligation.[289]

It is these two distinctions that cause problems concerning climate change. In a sense the change is caused by a man-made activity, but the hazard that then becomes a threat is of a natural kind. The Court's distinction has split the effects of climate change from its cause, making determining which category to put it in incredibly difficult. Compounding the issue is that many of the

[283] Mayer (2021) p. 435.
[284] Compare EEA (2020) p. 28; AR6, p. 68–81.
[285] AR6, p. 42.
[286] CC2022, p. 1827.
[287] Compare *Finogenov and Others v. Russia*, para. 243; *Tagayeva and Others v. Russia*, para. 563.
[288] Compare *Budayeva and Others v. Russia*, para. 135; *Finogenov and Others v. Russia*, para. 243; *Kolyadenko and Others v. Russia*; *Tagayeva and Others v. Russia*, para. 563.
[289] *M. Özel and Others v. Turkey*, para. 171.

arguments as to why natural hazards give rise to less extensive obligations get somewhat stretched in this case. Of course, it is difficult to determine where a flood or heatwave will occur, but the science clearly show that they will occur with increased frequency, arguably making them more predictable and identifiable.[290] Furthermore, as they are based in human activity, can they be said to be beyond human control or will this criterium have to be reevaluated? The term imminence or immediate is as explained in part 2.3.1.3 not defined by the Court, but as seen in *Öneryıldız v. Turkey* if the term is to be used as a timeframe, then the intended period in which a threat can be imminent is rather long.[291] It is then possibly that several natural hazards, more common in the future, can be seen as continuously imminent.

Using either the GHG emissions or the environmental risks as the source of harm have both benefits and disadvantages. Doing the first could make the source of harm a human activity and thus potentially making obligations more extensive. Although there are downsides to this method. First of all, it will likely be harder to show causation. The theoretical distance between a country's emissions and a mudslide is rather long and difficult to base responsibility on.[292] An additional possible downside is that even though the Court cannot order state action, any obligation in connection to this source of harm would potentially result in an obligation of mitigation, a reduction of emissions. Even if beneficial in the long run, the short-term benefits to human rights are negligible. In that case adaptive action would perhaps have had a better direct impact.[293] On the other hand using the natural hazard itself as the source of harm has the benefit of being more concrete. Since the Court already has a regime concerning environmental dangers,[294] this can more easily be applied to the shown environmental effects in the same way as it is today. It is likely that this also would lead to obligations concerning adaptation since these could have a more tangible impact on the source of harm.[295] What would be the most beneficial would be to see these two potential obligations as existing side by side, requiring both adaptation and mitigation.

3.3.3 Assessing state knowledge about climate change

As was stated in the previous chapter there are a few ways of determining if a state had knowledge of a potential harm or not. To refresh, state knowledge can be proven by for example state actions in connection to the danger, national reports, or objective scientific research.[296] Any general knowledge in these channels is often enough to establish an obligation to create a regulatory framework. In contrast any obligation to take operational protective measures

[290] Compare Stoyanova (2023b) p. 39.
[291] *Öneryıldız v. Turkey*, para. 100.
[292] Compare Boyle (2012) p. 640–641.
[293] Mayer (2021) p. 416.
[294] See for example *Budayeva and Others v. Russia*; *Finogenov and Others v. Russia*.
[295] Compare Mayer (2021) p. 416.
[296] See *Brincat and Others v. Malta*, para. 106; *Cevrioğlu v. Turkey*, para. 68; *O'Keeffe v. Ireland*, para. 168; *Öneryıldız v. Turkey*, para. 98.

would require more detailed information about a specific individual under threat. As has been detailed above most of the identified hazards are of a general nature and thus would require the creation of regulatory frameworks. Consequently, the state's knowledge about the risks of harm would not need to be as extensive.[297]

Beginning with state knowledge connected to climate change it ought not to be surprising that this criterion most likely is fulfilled. Simply counting the parties to the UNFCCC and the Paris Agreement ought to suffice. At the time of writing the UNFCCC has 165 signatories and 198 parties.[298] As the convention's objective is to stabilise GHG emissions to avoid dangerous human caused climate change, it can most likely be said that signatories to the convention had knowledge about climate change as a problem.[299] It is however not possible to infer much more from this alone. The convention does acknowledge certain areas particularly vulnerable to climate change, but for the European continent the dangers are not specified.[300]

Moving on to the Paris Agreement, here it may be possible to infer a greater knowledge about the effects of climate change on the planet. First there is article 2.1.a stipulating a goal for the limitation of global warming.

> Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.[301]

An argument can be made that the parties to the Agreement through this article showed an increased knowledge about climate change as a threat. Although a temperature limit has been established no further specifics are given about the effects of this change in temperature. The Agreement further mentions the need for general adaptation and some specific adaptation measures.[302] Moreover, mitigation is mentioned and called for several times.[303] Particularly article 7.4 is interesting as it recognizes that more

[297] Compare Stoyanova (2023b), p. 31.

[298] United Nations Treaty Collection, "United Nations Framework Convention on Climate Change", New York, 9 May 1992, accessed 14 November 2023, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.

[299] UNFCCC, article 2.

[300] Compare UNFCCC preamble "Recognizing further that low-lying and other small island countries, countries with low-lying coastal, arid and semiarid areas or areas liable to floods, drought and 5 desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change". This would include several areas in Europe such as the Alps. The dangers are as seen not made specific.

[301] Paris Agreement, article 2.1.a.

[302] See for example ibid, article 2.1.b, 5, 6.8, and especially article 7.

[303] See for example ibid, article 4, 6.4, 6.8, 7.4.

significant mitigation action reduces the need for adaptation. An increased knowledge about the need for mitigation can thus be seen. A development in comparison to the UNFCCC is the explicit statement about minimising the effects of extreme weather events and slow onset events.[304] Especially with the latter a broader temporal scope might have been implied. All in all, knowledge about climate change being dangerous is most likely evident. The further knowledge about adaptation and mitigation is perhaps not as relevant as this is not required for the establishment of an obligation. Nevertheless, it is interesting to note that such knowledge can be inferred. Through the signing of both the UNFCCC and the Paris Agreement knowledge about the dangers of GHG emissions and their negative effect on the climate can be established.[305] As has been stated above about the probable obligations many of them will be rather specific and connected to certain potential hazards. To show state knowledge about those problems significance must be given to the objective scientific knowledge.

Scientific knowledge about climate change readily available for states and what action states have taken in connection to climate change are somewhat linked in this case. The reason is that the IPCC's reports, which have been relied upon heavily, is used as a basis for knowledge during the negotiations under the UNFCCC. That means that the synthesis reports were used during the negotiations of the Paris Agreement. The panel itself is made up of representatives from the 195 member countries.[306] The reports are used as a source of knowledge when states act in connection to climate change. The other primary source used in the scientific background was the European Environment Agency. As an organisation under the European Union their reports are readily available to the countries in Europe.[307] Based on the rigorous scientific evidence that is now available, and that has been available since at least 2007,[308] and that this evidence is spread during the gatherings of the UNFCCC it would be very unlikely for the ECtHR to not find the state knowledge requirement fulfilled on this point. That knowledge concerns all the previously brought up hazards and potential dangers. It is however much more uncertain when that knowledge can be seen as fulfilled. All the reports gave basically the same conclusions but with differing levels of certainty and likelihood.[309] Consequently it becomes difficult to determine when the threshold for state knowledge first was reached. It is possible that the combined proof of state knowledge from both the scientific knowledge and state action was enough to fulfil the criteria in 2007 already. Potentially it was only fulfilled after the publishing of AR5 and the subsequent signing of the Paris

[304] Ibid, article 8.

[305] See for example Paris Agreement, article 2.1.b–c, 4.1; UNFCCC preamble, article 2.

[306] IPCC, 'IPCC FACTSHEET What is the IPCC?', 2021, accessed 14 November 2023 https://www.ipcc.ch/site/assets/uploads/2021/07/AR6_FS_What_is_IPCC.pdf.

[307] European Environment Agency, 'Who We Are', accessed 14 November 2023, https://www.eea.europa.eu/en/about/who-we-are.

[308] Compare AR4; AR5; AR6.

[309] Compare ibid.

Agreement. Due to the more rigorous scientific evidence available in AR5 and the concretisation of the problem of climate change in the Paris Agreement this is likely. At the very least the scientific evidence available in AR6 ought to conclusively meet the requirement on knowledge.

3.3.4 Knowledge about future harms

In addition to the already observed changes it can also be relevant to detail what the differing projected climate impacts are and what obligations they might give rise to. Even though the court's assessment is mostly backwards looking that does not mean that projected changes are not relevant. In this context it is useful to spend some time detailing the difference between the more general obligation towards the broader population and those measures required when the individual or individuals under threat are identifiable.

When it comes to protective operational measures it is perhaps not useful in a future context as the real and immediate standard must be fulfilled. Even if the Court has been somewhat fluent in its application and interpretation of the temporal scope of "immediate",[310] it is not certain that these anticipated changes detail a sufficiently immediate threat to be useful. Using the interpretation of the term most beneficial for applicants, that the risk was significant and continuous,[311] dropping the temporal aspect in favour of gravity, it still is not certain to be enough. Likewise, problems might arise around the identification of an adequately detailed group of people to trigger any obligation. Determining real risks as such might also prove problematic. As stated, the Court uses "real" to detail objective risks, risks that will materialise and the probability that a specific risk will occur.[312] Since the IPCCs reports are written in terms of certainty and likelihood a verdict must be reached regarding if the materialisation of the risk is likely enough to fulfil the Court's demands. The problems faced regarding the standard are mostly connected to the mentioned certainty, but also to the fact that some projections point to risks that might not be severe enough for any group of people. Instead, the harms are moderate and spread out over the entire population. These obstacles are large, however not insurmountable. Looking at *Öneryıldız v. Turkey* it becomes clear that even though the harm could have befallen anyone in the proximity of the tip and that the temporal scope of the harm was uncertain an obligation was still present.[313]

In contrast to the above, the projected changes might have more pronounced impact on the general obligation to protect populations. Primarily this is because the real and immediate standard is not relevant in that context. Resultingly the analysis must revert to simply determine obligations connected to

[310] Compare Stoyanova (2023b) p. 34–35.

[311] Compare Dissenting Opinion of Judge Metoc, *Hiller v. Austria*, no. 1967/14, 22 November 2016.

[312] *Kotilainen and Others v. Finland*, paras. 78–80.

[313] Compare *Öneryıldız v. Turkey*, para. 101.

dangerous activities and environmental harms. As can be seen from *Budayeva and Others v. Russia* obligations pertaining to potential future threats can be implemented as long as the threat is imminent and clearly identifiable. These will be more general in the form of legal frameworks and policies aiming to avoid the harm.[314] Consequently a weighing exercise must be done to determine if the threat in question is imminent enough. To an extent the Court ought to pay attention to the certainty of the projected changes here as well, but probably only to quantify the state knowledge regarding each risk. As the IPCC reports are detailed in their descriptions and calculations it can almost be said that the risks are more foreseeable than certain other natural calamities that can occur without warning or previous knowledge of risks.

3.4 Causation – Linking state omission to the harm

The next step in the Court's assessment would be causation. As explained in chapter 2 that is present if the state has failed to take any reasonably available measures that would have had an actual chance of avoiding the harm, either through adaptation or mitigation.[315] In a sense it can be summed up as if the state omission to act in a certain way or act at all can be linked to the materialisation of the harm. This section will look at the different obligations that were established in the previous part of the thesis with the aim of exploring if a causal link can be shown. It will begin by exploring the relevance of the source of the harm. It will then go through the various potential obligations established and problematize the choice between either adaptation or mitigation action further. Finally, it will investigate if there are any ways for states to be precluded from responsibility even if causation is shown.

3.4.1 Causation, climate change, and the source of the harm

In its evaluation of state conduct the Court once again makes a difference between man-made harms and natural harms, creating more extensive obligations in the prior case. Additionally, a causal link is deemed present if the state fails to regulate man-made dangerous activities.[316] In the case of natural hazards causal links are harder to show.[317] Resultingly the primary problem in determining a causal link lies in what source of harm is chosen as a base for the obligation. Moreover, a decision regarding the classification of GHG emissions might have to be made.

As showed in section 3.2.1 human activity is the foundation for global warming and thus also for all the adverse effects we are seeing.[318] The use of fossil fuels can arguably be called a man-made activity. Yet the danger posed by each litre of burned fuel is so small that causality to any state omission on this

[314] Compare *Budayeva and Others v. Russia*, paras. 137, 157–160.

[315] *O'Keeffe v. Ireland*, para. 149.

[316] *Budayeva and Others v. Russia*, paras. 131–132; Stoyanova (2018) p. 326; *Öneryıldız v. Turkey*, para. 71.

[317] For further elaboration see section 2.3.2.2.

[318] For elaboration see section 3.2.1.

point in contrast is harder to argue for.[319] The effect of burning fossil fuels on the climate is so small if broken down to constituent contributors that it almost approaches zero. Yet when conducted on a global scale the combined harm of these infinitesimally small contributions is immense. Zahar explained the complexity of this chain of causation well.

> To simplify, the emitted amount traps heat; the additional heat further affects Earth System processes already affected by the trapped heat of past emissions into which the impugned emission amount blends; and sometime in the future, the overall effect is experienced at one location or another as an abnormally harmful physical event in nature.[320]

As seen, it becomes difficult to point to any emission and say that the omission of a state party to hinder it was the specific event that caused harm to an individual. The consequence of all this is that proving causation to any state in Europe for an omission to reduce their GHG emissions becomes hard. A saving grace might be found in the rules pertaining to dangerous activities as states have an obligation to regulate these,[321] but in that case the emission of GHGs must be classed as a dangerous activity. As shown above that might prove challenging, regardless of the hard evidence that these emissions are the penultimate cause of climate change, its negative effects and therefore the threats to individuals' human rights.[322]

Here the Paris Agreement might come in handy as it provides a framework for classifying what causes dangerous change and how states are to deal with it. As was put forth previously a potential inward-looking obligation of cooperation and thus mitigation informed by the Paris Agreement might exist.[323] A violation of that obligation could take the form of an omission to adequately legislate in accordance with the states NDCs, consequently putting individuals within the state's jurisdiction at risk. Granted the NDCs are not themselves legally binding. Article 4.2 binds states to determine a NDC that the state intends to achieve and to take mitigation efforts with the aims of achieving the NDC.[324] Yet as can be interpreted from the articles use of "intends to achieve" and the latter "aims to achieve" it falls short of a binding obligation of results when it comes to mitigation. Rather it creates an expectation that states will attempt to reach their goals after having fulfilled the binding obligation of conduct to prepare, communicate and maintain contributions, as well as to pursue domestic measures.[325] Despite not being binding the article

[319] Compare Boyle (2012) p. 640–641.
[320] Zahar (2022) p. 386.
[321] *Budayeva and Others v. Russi*, paras. 131–132; Stoyanova (2018) p. 326; *Öneryıldız v. Turkey*, para. 71.
[322] Compare *AR6*, p. 42–44.
[323] For reference see section 3.3.1.
[324] Paris Agreement, article 4.2.
[325] Bodansky (2017) p. 231.

has been suggested to impose a due diligence standard on states, requiring them to adopt all measures needed to reach the NDC without necessarily the standard being violated if the goals are not achieved.[326] It has even been suggested that flagrantly insufficient domestic action, unable to achieve the state's NDC, could violate the binding obligation of conduct.[327] This in turn could inform the ECHR as to the scope of measures and what is required by them to be deemed appropriate.[328]

If the obligation is construed as suggested, then a causal link can be found between the increased threat levels and the omission to legislate in an adequate manner to achieve the goals set out in the NDC. In the terms of the ECHR, if the regulatory framework would not be sufficient to safeguard people's lives and health then a violation could be found. One problem with this reasoning is that such a line of thinking is close to allowing an abstract evaluation of domestic law since the effects of the emissions have not occurred fully yet. The Court has stated several times that such evaluations will not be conducted since they do not match the purpose of the Court.[329] Yet an application can be allowed if the applicant can produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur.[330] Establishing a causal link between failing to adequately legislate to reach a mitigation obligation and the human rights impacts this will have remains difficult, but with help from the Paris Agreement it is not impossible.

On the other hand, if the source of the harm is seen as one of the natural hazards detailed above, with accompanying positive obligations, then the causal link can prove easier to find. As stated in the beginning of this section the norm is the opposite, but since the problem of mitigation is so complex adaptive obligations might differ in this case. The scientific studies about climate change make it clear that natural hazards such as extreme weather events and floods are more common and will become more so. In some instances, locations that will be extra at risk are specified.[331] Accordingly it ought to become easier for the Court to determine that a natural calamity fulfilled the criteria of imminence and identifiability. A state can almost always take some reasonable and available measures that could have had an actual chance of avoiding the harm.[332] An evacuation can be ordered, better sewers can be constructed and regulatory frameworks ensuring early warnings and actions can, and with increased risks posed by natural events should be taken.[333] A

[326] Voigt (2023) p. 242.
[327] Ibid (2023) p. 242.
[328] Compare *Vavřička and Others v. the Czech Republic*, para. 282.
[329] Compare for example *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, 15 March 2012, para. 50; *Burden v. the United Kingdom* [GC], no. 13378/05, 29 April 2008, para. 33; *Roman Zakharov v. Russia* [GC], no. 47143/06, 4 December 2015, para. 164.
[330] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, para. 101.
[331] See for example EEA (2020) p. 31, 38.
[332] Compare *O'Keeffe v. Ireland*, para. 149.
[333] Compare *Kolyadenko and Others v. Russia*, para. 185.

lapse in this regard leading to the death or injury ought to be easily linked to a state omission.[334] In comparison to mitigation obligations the source of the harm has moved closer to the state conduct, making it easier to see.

3.4.2 Assessing causal links in connection to climate change

Attribution to a state agent can be relevant when it comes to establishing causal links. However, since the present case almost exclusively deals with the general obligation of setting up regulatory frameworks it becomes less significant. In most states the creation of these frameworks would require the involvement of the legislative body or other parts of the government. Consequently, it can be assumed that in almost every case the rules of attribution in ARSIWA would be fulfilled.[335] In other cases the individual situation would require further scrutiny.

As was discussed above, establishing a causal link between a potential obligation to mitigate GHG emissions and a state omission can be tricky. First of all, the obligation must be accepted. The easiest way to then find a causal link is if the emission of GHGs itself is classed as a dangerous activity. In turn, that would demand regulation from state parties. In failing to do so the causal link between the states inaction and the failed obligation would become clear.[336] If GHG emissions are not seen as a dangerous activity then the inward-looking obligation proposed by Mayer and informed by the Paris Agreement would have to be utilised and causal links demonstrated. In that case the test set out in *O'Keeffe v. Ireland* would have to be used to show that the state failed to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm.[337] The harm in question would have to be manifested as a harm against an individual and be able to be traced back to the states failure to perform its mitigation obligation. By using the proposed obligation this ought to be possible in some circumstances. Yet it would require a state failing to take a mitigating action that the Court must deem both appropriate and reasonable, as well as able to have mitigated the harm. Since mitigation actions rarely have such large immediate impacts that would likely be difficult.[338]

Due to the language used in the test of *O'Keeffe v. Ireland* it becomes somewhat dubious whether a state that have performed the mitigation action and no more would have fulfilled the obligation. As stated previously,[339] the language suggests that the test does not at this stage make a difference between mitigation or adaptation. In the case of harm materialising, would a state be

[334] Compare *Budayeva and Others v. Russia*, para. 147–160; *Kolyadenko and Others v. Russia*, paras. 168–187.

[335] Compare ARSIWA, article 4–6.

[336] Compare *Budayeva and Others v. Russia*, paras. 131–132; Stoyanova (2018) p. 326; *Öneryıldız v. Turkey*, para. 71.

[337] *O'Keeffe v. Ireland*, para. 149.

[338] Mayer (2021) p. 416.

[339] For elaboration see section 2.3.2.

able to point to the domestic mitigation action and remain blameless, arguing that further mitigating actions would not increase the domestic benefits?[340] Most likely not. Rather it is more likely that the ECtHR would demand some adaptive action be taken to prevent harm. Any other conclusion would run foul to the spirit of positive obligations found in article 2 and 8. This would support the theory that both a mitigation and adaptation action would exist side by side.

Moving on to how causality can be shown in cases of natural events. As shown, this might be somewhat simpler. Any action contrary to domestic law makes it easier to establish a causal link.[341] If a state has obliged with the likely obligation of ensuring a more extensive and effective regulatory framework for dealing with the effects of natural calamities, then domestic law concerning the topic will be in place. Any state response to a possible threat will then be measured against this framework. If contrary to it a causal link is easier to confirm. Yet it is often not enough and a further investigation into each individual case must be conducted.[342] Nevertheless, if a framework demanded that all areas prone to flooding be protected and that has not happened, it will be easier to find a causal link. Certainly, states can follow domestic law perfectly and still fail to fulfil their obligations due to an inadequate legal framework.[343] This would however require a deeper investigation into the framework itself. To continue the previous example, it could be done to see if the framework demanded any sort of reasonable measure that could help avoid the harm in areas prone to flooding and thus safeguard the rights of people there. If not, a causal link can potentially be established in the case of harm materialising.

Testing state inaction against national laws is of course also possible when it comes to mitigation. In the case of *Budayeva and Others v. Russia* it was enough that the state authorities through various means had been made aware of the risks of a mudslide in the area. The failure to then take any sort of action was enough to prove a causal link and find a violation of the Convention.[344] Even if natural hazards are becoming more common, therefore demanding more extensive action, it might not be reasonable to expect state parties to successfully combat each of them to the point of avoiding all harm. This brings us to the next part, how responsibility for climate change induced natural hazards can be avoided even if causality is shown.

[340] Compare Mayer (2021) p. 446–447.

[341] Stoyanova (2018) p. 332–334.

[342] Ibid, p. 332, 334.

[343] Compare Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights', in *Human Rights and Civil Liberties in the 21st Century*, ed. Yves Haeck and Eva Brems, Ius Gentium: Comparative Perspectives on Law and Justice (Springer Netherlands, 2014), 69–129, p. 82.

[344] *Budayeva and Others v. Russia*, paras. 147–160.

3.4.3 Avoiding responsibility for climate induced natural hazards

Even if causation is shown the Court will still have to determine if finding a violation would be reasonable or if it would put a disproportionate burden on the state.[345] This assessment will be rather brief as reasonableness will be further investigated in the next section. Furthermore, each review by the Court is done on a case-to-case basis, taking into account the rights of others, state finances and other concerns of public policy.[346] Therefore the following piece becomes somewhat speculative. Bearing that in mind there are several ways in which a failure to comply with the obligations might be protected by the exception of reasonableness. Beginning with policy considerations. As is seen in *Mastromatteo v. Italy* not even a failure to protect the right to life is always deemed a grave enough consequence to strike down other policy considerations.[347] What those considerations might be in a future case is hard to say. What can be concluded however is that some policy with another aim must exist and to a certain extent be at odds with the potential obligations.

In the case of adaptation action, it seems likely that choices will have to be made regarding how to best adapt to the changes coming. Even if the effects of climate change are becoming better understood the natural events they lead to still have and most likely will continue to have a certain degree of uncertainty to them, making adaptation more difficult.[348] Moreover, certain routes of adaptation can lead to other risks materialising. An example can be seen in coastal flooding. Two examples of adaptation are the raising of dykes and the restoration of wetlands. The former taking up less space, thus being more feasible for urban areas, and the latter having several other ecological benefits.[349] A coastal city might construct dykes to protect low lying areas, reasoning that wetlands cannot be constructed or restored since that would require too much space. During a storm the dykes might fail, resulting in the flooding of the area behind and potentially the death or injury of people there. Wetlands could have been a better option, reducing the height of the waves,[350] but taking the wider circumstances into consideration the policy choices can seem reasonable. The causal link is there. The authority's choice of a dyke instead of a wetland caused the rapid flooding as the dykes failed. Yet the choice of this adaptation might be seen as reasonable by the Court and no violation found. Similar arguments can be made regarding budgetary choices and the rights of others.

Above argument can be extended to mitigation action as well. In this case however it might be even harder to find a state's actions unreasonable. A large

[345] Ibid, paras. 135–137; Stoyanova (2023b) p. 67.
[346] Hickman (2004).
[347] *Mastromatteo v. Italy*, paras. 69–79.
[348] AR6, p. 68–77.
[349] CC2022, p. 1830.
[350] Ibid, p. 1830.

part of the reason is that there exist many more options to achieve mitigation, all with different advantages and disadvantages.[351] If the particular choice of the state fails to live up to the expectations of the inward-looking obligation of cooperation informed by the Paris Agreement it might thus be more difficult to prove that it was not reasonable at the time it was put in the framework. This is due to the simple number of choices available. Resultingly a state might have an easier time avoiding responsibility on this point.

The same can be said about state finances. Many mitigating actions are expensive to put in place.[352] Several member states to the ECHR have limited economic capacity, especially in eastern Europe but to a certain degree the Mediterranean region as well.[353] Hence it is likely that cheaper options of mitigation or adaptation will be chosen. Demanding that these states use large amounts of their annual budgets on mitigation measures might be seen as unreasonable by the Court. Additionally, such larger mitigation projects might threaten the rights of other individuals as there will be less room in the budget to protect and advance other human rights.[354] Protecting human rights often demands positive action, and positive action costs money. The prioritization of this money becomes an important element to consider for the Court in its determination of reasonableness. Moreover, larger projects, such as the construction of dams to produce hydropower or retain water, can clash with other human rights as well. In this case a likely candidate would be the right to property in Article 1 of Protocol No. 1 to the ECHR. A dam would flood a larger area, possibly demanding the eviction of people living there. Such an act would not only run afoul of the Convention but also the spirit of the Paris Agreement.[355] Consequently finding responsibility for violations to the potential mitigation obligation can prove challenging, despite causal chains being present.

Despite this thesis focusing on the more general obligations of states in relation to the threats of climate change it can be prudent to also bring up the real and immediate risk standard. The application of this standard ought not to change that much. In the event an individual's right to life and health are threatened by a real and immediate risk and the state had or ought to have had knowledge about it, the state already has an obligation to take protective operational measures.[356] This remains true even if the risk emanates from danger in the environment surrounding people.[357] It is however limited as to not

[351] See for example Bengt Nordén, 'Mitigating Climate Change Effects: A Global Approach', *Molecular Frontiers Journal* 06, no. 01n02 (June 2022): 7–23.

[352] Mayer (2021) p. 417–418.

[353] World Bank, 'GDP (current US$) - Europe & Central Asia', World Bank Open Data, accessed 22 November 2023, https://data.worldbank.org.

[354] Mayer (2021) p. 416–419.

[355] Paris agreement, preamble para. 12.

[356] *Osman v. the United Kingdom*, para. 116.

[357] *Öneryıldız v. Turkey*, para. 101.

impose an impossible or disproportionate burden on the authorities.[358] Applying this to mitigation obligation ought to be almost impossible as the emission of GHGs almost never themselves threaten the rights of people. Rather their effects do.

Thus, what must be investigated is the impacts of climate change on this already existing obligation. Two major effects can be found. Firstly, as global warming and climate change keep worsening, the number of threats and knowledge about them will increase.[359] This increased knowledge might affect the real and immediate standard. Events that the Court considers real threats would likely become more common as previously safe areas experience hardships and threatening events become more frequent. This frequency would also likely affect the determination of immediacy. Even if the Court has been reticent in conclusively specifying the term,[360] more numerous threats should impact all definitions used. Yet this is probably especially true when the term is used to mean that a risk was significant and continuous since in many areas risks of the effects from climate change will be almost ever present.[361] Secondly there exists groups that are particularly vulnerable to global warming.[362] Even if they in many cases might be large enough to warrant general action situations can develop that will require specific measures for certain individuals. If a situation required a state to take protective operational measures and it did not it will still be easier to establish a causal link.[363] Since knowledge about global warming and climate change is increasing it will possibly be easier still. However, if the real and immediate standard is not fulfilled then despite strong causation a state will still avoid responsibility.

At the last there is the requirement that the failure triggering the harm is systemic.[364] Even if most likely envisaged to limit state responsibility for the failing of state agents, it can still be used during an assessment of the obligations proposed by this thesis. The idea is that a state should not be held responsible for any failings on part of an individual acting on behalf of that state or any chance failings of a framework otherwise deemed sufficient.[365] When it comes to adaptations to changes brought on by global warming, frameworks will have to be created and certain actions be taken. To exemplify, dykes and dams might have to be built and building projects in areas prone to flooding restricted. A regulatory framework to this effect should be put in place, based on the best scientific knowledge about how the state in question will be affected by climate change. Yet weather is unpredictable and despite the best

[358] *Osman v. the United Kingdom*, para. 116.
[359] EEA (2020) p. 15–50; CC2022, p. 1822–1865.
[360] Compare Stoyanova (2023b) p. 34–35.
[361] Compare EEA (2020) p. 15–50; CC2022, p. 1822–1865; AR6, p. 68–77.
[362] CC2022, p. 1860.
[363] Compare Stoyanova (2023b) p. 37–38.
[364] Compare *Mastromatteo v. Italy*, para. 73.
[365] Compare *Lopes de Sousa Fernandes v. Portugal*, para. 187; *Mastromatteo v. Italy*, para. 73.

of efforts adaptations can fail. A so called 1-in-100-year flood event,[366] might occur unexpectedly in a place where predictions did not assume. The adaptations were built to sustain everything science showed could come, but not this unpredicted event. Subsequently, they fail, and people are hurt and die. Yet the framework and preparations put in place were sufficient for what could be expected and cannot be blamed for what happened. The failings happened due to a freak event and do not necessarily show any systemic failures on part of the state. After all the authorities cannot always be held accountable for all human rights violations during a natural disaster.[367] The causal connection is there. Had the state prepared for more severe events than science showed it had to, people might have been safe. But since science did not predict the possibility of the event the framework lacks systemic flaws. Responsibility would thus be precluded.[368]

Similar arguments to above can be made regarding the obligation to mitigate. The framework put in place can be very well thought out and made to achieve the goals of the Paris Agreement. Then a nuclear power plant unexpectedly breaks down and reserves in the form of old coal plants must be reengaged. The framework can still be adequate and the temporary cessation of adherence to it do not necessarily show that systemic shortcomings exist.

3.5 Reasonableness of mitigation and adaptation

Then to the final element of the Court's assessment of these potential positive obligations. As was seen in previous segments, it would continue to play a major part of those elements as well. What follows here will be an overview of how the more abstract and general standard of reasonableness would affect and in turn be affected by the suggested obligations. With a basis in the scientific background and the Paris Agreement it will moreover try to determine what the Court would consider reasonable demands set by the obligations. It will then briefly touch upon how this more general standard could influence the investigation of state knowledge and causation. Throughout the section the margin of appreciation will be considered where appropriate and its effects on the Court's potential scrutiny will be explained.

3.5.1 The determination of reasonableness of mitigation and adaptation obligations

Generally concerning both the inward-looking obligation to mitigate and the obligation to adapt, the test of reasonableness will act as a limitation on what the contracting states are expected to do to fulfil the obligations. It must be remembered that the standard to achieve is to take reasonable steps to prevent harm that states had knowledge about, and which not impose impossible or

[366] For reference see AR6, p. 11, 100.
[367] Knox (2009) p. 478.
[368] Compare *Mastromatteo v. Italy*, para. 73

disproportionate burdens upon the states.[369] An important facet to remember is the latter mentioned impossible or disproportionate burden. Beginning with adaptation there exists many ways in which each conceivable threat can be tackled, and they vary in effectiveness, cost, and impact on other systems, both human and natural.[370] As the ECHR is anthropocentric in nature,[371] only the impacts on human systems will be considered. As such an adaptation measure will be weighed against the public interest in the form of public policy considerations, budgetary concerns, cost, and resource effectiveness as well as other more universal practical obstacles and competing interests.[372] Yet as the Court has not produced an exhaustive list of criteria to investigate reasonableness with,[373] the following discussion will have to be rather abstract.

An example might be found in the problem of overheating inside cities. Suggested solutions to reduce this risk inside buildings, thus ensuring the safety of the inhabitants, include increased demands on the installation of air conditioning, or mandated use of more reflective paint. The former is deemed to be more effective, but also more expensive than the latter. At the same time, it emits more GHGs since large parts of the European electricity production is still based on fossil fuels.[374] As a result parallel mitigation actions might be hindered.[375] The latter, although cheaper, ought to require a higher degree of work as old buildings must be repainted to gain the benefit. That would require a substantial initial investment and the potential gain is comparably small. Which of these actions would the Court see as reasonable? That is difficult to say since so many interests must be considered and due to the large number of available alternatives.

Further compounding the problem of determining practical measures is the margin of appreciation. Adaptations will seek to combat climate change. As this is expressed through various natural events it is likely that the margin of appreciation will be rather large.[376] It is possible that this wide margin of appreciation will mean that the Court only can determine if a state action was

[369] *Budayeva and Others v.* Russia, para. 135; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, para. 132; *Cevrioğlu v. Turkey*, para. 52; *O'Keeffe v. Ireland*, para. 52; *Öneryıldız v. Turkey*, para. 107.

[370] CC2022, p. 2551.

[371] See for example ECHR article 1 and 34. Especially the reference to "individual" in article 34 makes it clear that the focus on the document is humans. Furthermore, the reference to the Universal Declaration of Human Rights (UDHR) in the preamble cements this as the UDHR according to its text cements the rights for the "human race". Also compare Mayer (2021) p. 425.

[372] Compare *Dodov v. Bulgaria*, para. 102; *Evans v. the United Kingdom*, para. 77; *Kapa and Others v. Poland*, para. 163; *Mosley v. the United Kingdom*, para 121; *Öneryıldız v. Turkey*, para. 107.

[373] Compare Stoyanova (2023b) p. 75.

[374] CC2022, p. 1870.

[375] Ibid, p. 1864.

[376] Compare *Budayeva and Others v. Russia*, para. 135.

sufficient or not, not if the action taken was the most sufficient.[377] After all the standard demands reasonable steps, not all measures.[378] This in turn can lead to a race to the bottom approach to measures taken, when states try to find the easiest ways to fulfil their obligations.[379] Hence the obligation is likely to be limited in its scope to the most cost-effective and least intrusive actions. This might not be problematic when it comes to choosing between adaptation options but might be so in choosing between adaptation or mitigation.

One way to avoid this race to the bottom would be the aforementioned use of the Paris Agreement. Article 7.9 stipulates that "Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions".[380] The article is binding,[381] and forces states to take appropriate action. This ought to be seen in connection with the effects of climate change experienced by a particular country and that states are expected to adapt to them. The article goes on to suggest what the policies and/or contributions of the demanded plan may include. This part is however not binding.[382] Nonetheless, it includes

> (a) The implementation of adaptation actions, undertakings and/or efforts; (b) The process to formulate and implement national adaptation plans; (c) The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems; (d) Monitoring and evaluating and learning from adaptation plans, policies, programmes and actions; and (e) Building the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources.[383]

These suggestions are further joined by the acknowledgements in article 7.5.

> Parties acknowledge that adaptation action should follow a country-driven, genderresponsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the

[377] *Hatton and Others v. United Kingdom*, para. 123; *S.H. and Others v. Austria*, para. 106.

[378] *Budayeva and Others v.* Russia, para. 135; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, para. 132; *Cevrioğlu v. Turkey*, para. 52; *O'Keeffe v. Ireland*, para. 52; *Öneryıldız v. Turkey*, para. 107.

[379] Eva Brems, 'Human Rights: Minimum and Maximum Perspectives', *Human Rights Law Review* 9, no. 3 (1 January 2009): 349–372, p. 353.

[380] Paris Agreement, article 7.9.

[381] Bodansky (2017) table 7.1.

[382] Ibid, table 7.1.

[383] Paris Agreement, article 7.9.a–e.

> best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.[384]

Despite not being binding provisions, they are created as an extension to achieve the goals of the agreement set out in article 2 and ought to be able to inform the Court as to what an appropriate and reasonable adaptation action must include and what considerations must be taken.[385] Both the suggested actions in article 7.9 and the considerations in article 7.5 should be able to be integrated into the already existing list of considerations,[386] as many of them should fulfil the criteria of reasonableness.

With the proposed mitigation obligation there are similar problems of reasonableness. As can be seen above,[387] the obligation already faces something of an uphill battle regarding both state knowledge and causality. The situation is somewhat similar here. The problem of climate change is of global nature and few states in Europe have a considerable impact on the total GHG output. Consequently, those states reducing their output would have a negligible effect on the experienced threats to human rights.[388] This problem might cause the Court to deem any obligation to mitigate the worsening of climate change as unreasonable. Since it would be difficult for any European country to produce noticeable results via mitigation, demanding such might be seen as an impossible or disproportionate burden. Additionally, such results or indeed any mitigation is not necessarily demanded by Mayers proposed obligation, depending on the context of climate change in each state.[389]

Yet an interpretation of the obligation in conjunction with the Paris Agreement may lend further context to content of the obligation, hopefully making a certain amount of mitigation more reasonable. The obligation to create NDCs and the obligation of conduct to aim to achieve the NDCs would set a parameter for reasonableness. Even by achieving the Paris Agreement's goal of no more than 2°C of global temperature increase, the health and even lives of thousands of people in Europe would come under threat.[390] To avoid consequences worse than that, the Court ought to find it reasonable that each state party is liable for the failures to achieve the mitigation measures set out in the party's NDC. The obligation does not demand results outside of the country itself. Instead, each state is treated as its own enclosed entity. Any emissions

[384] Paris agreement, article 7.5.

[385] Voigt (2023) p. 244.

[386] Compare *Dodov v. Bulgaria*, para. 102; *Evans v. the United Kingdom*, para. 77; *Kapa and Others v. Poland*, para. 163; *Mosley v. the United Kingdom*, para 121; *Öneryıldız v. Turkey*, para. 107.

[387] For elaboration see section 3.3–3.4.

[388] Boyle (2012) p. 640–641; Mayer (2021) p. 423–424; Knox (2016) para. 71.

[389] Compare Mayer (2021) p. 433–435.

[390] Compare EEA (2020) p. 28.

above the NDC could be seen as causing the threats of harm that the domestic population will experience as an effect of climate change. The state would also only be responsible for domestic mitigation. If the NDC is fulfilled, then so is the obligation to mitigate. Further adverse effects from climate change could be tackled with adaptation. Such an obligation still stays true to the spirit of Mayers inward-looking obligation to cooperate and simply uses the Paris Agreement to flesh it out,[391] showing what could be considered appropriate and reasonable action.[392]

Moving further towards the concrete is difficult. To fulfil the goals of the Paris Agreement the NDCs will require concrete actions. What these will be in each case is impossible to say, but they will likely need to have an actual chance of achieving the NDC. The specific actions must also be reasonable and not create an impossible or disproportionate burden. The number of combinations of possible actions to fulfil an NDC is conceivably greater than with adaptation since the threat is more diffuse.[393] Many of them require difficult social and technical considerations that will widen the margin of appreciation.[394] In a similar fashion to the effects on adaptation action it is probable that this will restrict the ECtHR's assessment in each case to if a particular framework to achieve an NDC was sufficient.[395] Subsequently it is possible with another race to the bottom.[396] Though here the Paris Agreement lends no support as it lacks suggested actions and considerations concerning mitigation, settling with stating that greater levels of mitigation can reduce the need for adaptation.[397]

3.5.2 How could the demands on knowledge and causation be affected by reasonableness?

Putting aside above discussion, reasonableness being found or not can in turn affect the determination regarding the previous two categories of state knowledge and causation, as well as being affected by them in turn. For the sake of argument, let us imagine that the Court looks at the dire situation humanity faces due to climate change. When life and health is at stake it is not unknown for the ECtHR find it reasonable that states should take action, sometimes placing the bar rather low.[398] It would therefore not be

[391] Compare Mayer (2021) p. 433–436; Paris Agreement, article 4.2.

[392] Voigt (2023) p. 244.

[393] Compare the many suggested actions in for example Nordén (2022).

[394] *Hatton and Others v. United Kingdom*, paras. 100–101; *Öneryıldız v. Turkey*, para. 107.

[395] Compare *Hatton and Others v. United Kingdom*, para. 123; S.*H. and Others v. Austria*, para. 106.

[396] Brems (2009), p. 353.

[397] Paris Agreement, article 7.4.

[398] Compare for example *Vilnes and Others v. Norway*, para. 244. Moreover, see *Budayeva and Others v.* Russia, paras. 147–160. In finding a violation the Court also finds that taking action and setting up a warning system would have been reasonable.

unprecedented if taking action was found reasonable in the case of climate change, thus affecting the view of state knowledge and causation.

The level of state knowledge impacts the determination of reasonableness and the other way around.[399] As has been shown the knowledge about global warming, its effects and its causes is extensive.[400] Even if certain factors, as the precise time and place of natural calamities, remain uncertain the available knowledge has made both them and their possible solutions more clear and foreseeable.[401] In turn this would likely broaden the scope of what the Court would deem reasonable in the sense that more extensive action could be required.[402] On the opposite end of the spectrum some leeway must still be given to the random chance that nature imposes when disasters occur. Even by taking all necessary and reasonable actions unforeseen circumstances can affect the outcome lending all preparations moot. A storm might be just a little stronger than expected, a landslide might happen in an area that was thought to be safe, or a dam might fail. In these incidents the reasonableness standard will still act as a buffer, rightfully precluding state responsibility where necessary.[403]

As previously stated, proving causation in connection with the proposed obligations might prove challenging.[404] The reasonableness standard might aid in this situation as well. If deemed sufficiently fulfilled, then it can lessen the demands on causation.[405] In the case of *Vilnes and Others v. Norway* the Court seems to have weighed the potential benefit of state action against the burden of taking the suggested action. The burden being small and the benefit great it seemed reasonable that the state would have acted.[406] If the threat from global warming is seen as dire enough then it is likely that the expected demands on causality might lessen in a similar fashion. Yet due to the rather demanding nature of both adaptation and mitigation actions it might not be lessened to such a large extent. As an example, a possibly not so demanding mitigation measure would be a framework ensuring a partial reduction of the energy tax for households with contracts from green energy providers, for example a company sourcing all its electricity from wind and solar. If found highly reasonable then the causal chain connecting the omission of a state to put such a framework in place and the potential harm that could befall domestic populations would not need to be as stringent.

[399] Compare *Budayeva and Others v. Russia*, paras. 134–137; Knox (2009) p. 478; See Stoyanova (2023b) p. 75–76.

[400] For further elaboration see section 3.2.

[401] Compare EEA (2020); CC2022, p. 1822–1870.

[402] Stoyanova (2023b) p. 75–76.

[403] Knox (2009) p. 478.

[404] For further elaboration see section 3.4.

[405] Compare *Vilnes and Others v. Norway*, paras. 233–244.

[406] Compare ibid, paras. 233–244.

Although the opposite scenario ought to have the inverse consequences. As can be seen in *Mastromatteo v. Italy* the causal chain can be clear as day and a violation will still not be found.[407] As is understood from the case and the case law other considerations are important to the Court.[408] Moreover states cannot be expected to know all the consequences of their actions and to be held responsible for the things done by all individuals within their borders.[409] Wetland restoration can be used as an example. For its many benefits, mitigating, adapting as well as ecological,[410] it is chosen by a state as a means to partially fulfil the proposed obligations. The consequences might be an increase in the number of mosquitoes and possibly disease.[411] The state choice of wetlands is directly linked to these consequences. Yet due to the many other benefits and considerations it might still be seen as reasonable.[412] Resultingly the state can avoid responsibility.

3.5.3 Section conclusion

As was shown in the scientific background, the threat posed by climate change to several areas of Europe is already great and will only continue to rise.[413] In turn these threats might give rise to two sets of obligations, one concerning adaptation and the other concerning mitigation. The former is not so much a new right as a modification of the already existing regime of protecting life and health from environmental dangers, extending it to encompass the effects brought on by climate change and global warming. The later would be something new to the ECHR. An inward-looking obligation to cooperate seen in the light of the Paris Agreement. What they both have in common though is that they most likely would be formulated as an obligation to provide general protection to society through the creation of regulatory frameworks.

In relation to the threats giving rise to the obligations, state parties to the ECHR have showed general knowledge of the problem for a considerable time through their signing of the UNFCCC, with its clear goals of stopping climate change through the reduction of GHGs.[414] Furthermore, the signing of the Paris Agreement with its more precise wording and more extensive

[407] *Mastromatteo v. Italy*, paras. 10–29 and 74.
[408] Hickman (2004).
[409] Compare ARSIWA, article 4–6.
[410] CC2022, p. 1830–1832.
[411] Ibid, p. 306.
[412] Compare *Mastromatteo v. Italy*, paras. 10–29 and 74–79.
[413] For further elaboration see section 3.2.2–3.2.4.
[414] UNFCCC article 2; United Nations Treaty Collection, "United Nations Framework Convention on Climate Change", New York, 9 May 1992, accessed 14 November 2023, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.

scope, and the readily available scientific knowledge ought to clearly show more specific knowledge to the problems Europe is and will be facing.[415]

The challenges of implementing the two proposed obligations begin appearing first when the analysis moves on to determining causation. Causation could be problematic to establish in relation to a state failing the mitigation obligation as each state in Europe contributes such small amounts of globally emitted GHGs. Additionally finding a link between any specific amount of GHG released and the compound effects of global warming is difficult. The Paris Agreement is proposed to be able to act as an aid, linking the obligation to mitigate to the NDCs states submit as parties to the Agreement. Regarding the adaptation obligation, it would likely become easier to establish a causal link between state omissions and harm as the causative harm will become more foreseeable. There however remains ways for states to avoid responsibility regardless of if a causal chain can be shown, including reasonableness, the real and immediate standard, and the requirement that the harm must be linked to a systemic failure of the state.

Reasonableness is also found to be a possible hamper to the implementation of the proposed obligations. Finding that both the various other considerations states must make, and the probably large margin of appreciation might cause a race to the bottom in terms of ambition. Once again it is suggested that the Paris Agreement might be used as a solution. As a tool for interpretation, it would give several suggested actions in terms of adaptation yet be somewhat lacking in aiding the interpretation of the mitigation obligation. Lastly, if the Court does find certain action pertaining to the suggested obligations reasonable, that might affect the findings regarding both state knowledge and causation. Resultingly, this would either lessen or increase the demands for the elements of the Court's investigation to be seen as fulfilled.

[415] See for example Paris Agreement, article 2.1.b–c, 4.1; UNFCCC preamble, article 2. Also compare AR4; AR5; AR6.

4 Chapter 4 – Conclusion

4.1 Recapitulation

This thesis set out with the goal of furthering the understanding of the substantive positive obligations connected to climate change within the ECHR system and investigating how human rights can be used in the battle against climate change, but also what the challenge in doing so entails. It has looked at ECtHR jurisprudence, doctrinal research as well as the best available science concerning climate change. Through these sources the Court's method for establishing positive substantive obligations in connection to the right to life and the right to health was consolidated. Additionally, the most current and for the rights investigated relevant scientific data was abridged as a foundation for the continued discussion. Lastly the foundation created by the ECtHR's method and the scientific foundation was used to investigate possible positive substantive obligations and their implementation, thus fulfilling the purpose of the thesis.

To perform this study the thesis has posed the following research question:

R: Does the ECHR contain any substantive positive obligations connected to climate change? If so, what might their content be?

In order to answer this overarching main question, the thesis has further investigated a number of sub questions. They were as follows:

a) How does the ECtHR establish a positive obligation?
b) How can the content of any positive substantive obligation connected to climate change be informed by the Paris Agreement?
c) What might the implementation of any positive substantive obligation connected to climate change look like?

The first part of the thesis tackled the first of the sub questions to build a framework from which the rest of the questions could be answered. It concluded that the tests used by the ECtHR to first create a positive obligation and then attach it to a state are complex and intertwining. For a state to be held responsible there must be a threat of harm to the right of life or health of a specific individual or a group of people, the state must have or ought to have had knowledge of the threat, the omission of acting or the inappropriate action of the state must somehow pertain to the harm. Lastly, holding the state responsible must be reasonable, and the obligation put on the state must not impose an impossible or disproportionate burden. These three criteria also intertwine in several places and can affect the determination of each other. It was further concluded that the source of harm is essential in determining not only the scope of the obligation, but also the criteria of state knowledge, causation, and reasonableness. Man-made threats give rise to more extensive

obligations and are expected to be regulated by the state while threats from natural events create less extensive obligations and causation is harder to show, since the events are less foreseeable. Furthermore, for an obligation to arise the natural calamity must be imminent and clearly identifiable, with there being some confusion over precisely what the term imminent entails in this circumstance.

The second part of the thesis begun by laying the needed groundwork of best available science to clarify the dire situation that humanity faces in the form of climate change. It was determined that the greatest impacts on the right to life and right to health in Europe is caused by the warming itself and the increased precipitation, as well as global sea level rise. The more specific threats consist of the effects of these phenomena such as heatwaves, floods, and mudslides. Already such events are causing death and injury, and the toll of their passing is estimated to increase in tandem with the temperature.

Having built a solid scientific foundation, the thesis continued by utilizing the foundation to begin answering the main research question, as well as sub question b) and c). It was quickly found that the threats to life posed by the natural calamities caused by climate change could probably give rise to adaptation obligations needed to safeguard the populations of signatory states to the ECHR. The introduction of such an obligation is moreover supported by the Paris Agreement and could work as an adjunct to the already existing regulations concerning environmental disasters. Yet the specific content of the obligation would need to be individualised for each state and threat. Additionally, the margin of appreciation would likely be large. Finding an obligation to mitigate climate change was more challenging, but in the end an inward-looking obligation of cooperation informed by the various binding and guiding articles of the Paris Agreement was decided to be acceptable. Resultingly, the obligation was seen as connected to the actions set out by states in their mandatory NDCs, seeing the fulfilment of the NDC as an appropriate action. The obligation would need to be adjusted in so much that it only demands action that benefitted domestic populations. In both these cases it would be likely that the most abstract form of the obligation would take the form of a demand to create regulatory frameworks to effectively safeguard the rights expressed by article 2 and 8.

Furthermore, it was concluded that the state parties of the ECHR had fulfilled the knowledge requirement due to three considerations. Firstly, via the signing of the UNFCC with its clear purpose of stopping anthropogenic climate change. Secondly, through the signing of the Paris Agreement with its more concrete formulations of the threat, the goal, and the ways to get there. Thirdly, the objective scientific knowledge readily available, currently and in the past, have showed where the wind was blowing. State knowledge about climate change and its threats was thus established.

Yet the implementation of the proposed obligations would likely be threatened by the requirement of causation. This would be especially true for the mitigation obligation as it would be much harder to find a causal link between the failed mitigation of any one state in Europe and the particular effects of that failure befalling the inhabitants of that state. The Paris Agreement and the linking of the obligation to the NDC was proposed as a way to alleviate this tension and possibly find a new route to establish a causation link. With the adaptation obligation this was not found to be such a large issue and causation would possibly be easier to show. Yet the precluding factors established by the Court would still need to be avoided.

The last theoretical hurdle to pass would be that of reasonableness. That could prove somewhat difficult for any of the proposed obligations depending on the decision of the ECtHR in each case. As the Court has never produced a conclusive list of considerations analysed in its decision regarding this criterion it becomes difficult to draw accurate conclusions. Regardless, there are many considerations that the Court has used that would become relevant in connection to the proposed obligations, making them harder to argue for or creating a race to the bottom in terms of ambition. Once more the Paris Agreement with its several suggested actions and goals might help in guiding the reasonableness assessment of the adaptation obligation, but perhaps not the mitigation obligation.

If the reader is to take away anything from this text it is this. The addition of a positive substantive obligation connected to climate change in the ECHR is a very difficult and complex issue. There are certainly benefits of creating such obligations, yet many drawbacks as well since the system created by the ECHR never was envisioned to handle such global challenges. Challenges where victim and perpetrator become blurred and the lines between them difficult to follow. Challenges where the seemingly harmless actions of so many results in the potential deprivation of thousands. However, adapting the system to these new challenges is not impossible. The ECHR has a history of broadening its scope to tackle new threats and it certainly can do so again. With the aid of the Paris agreement a conceptualisation of the proposed positive substantive obligations becomes possible. Yet their implementation would still not be easy, and many challenges would remain.

4.2 Further outlook

This thesis has showed that there might exist positive substantive obligations connected to climate change in the ECHR and that they can become more and more relevant as global warming progresses. It is possible to apply them and give them form and substance that would fit the current method of testing used by the ECtHR. Despite there being several challenges to their implementation they stand a chance of being effective and with a threat against our lives and health of this magnitude it would be foolish not to use every tool in the toolbox, attempting to reach a favourable outcome. By focusing on the

internal benefits, the obligations would moreover fit well with the current understanding of the Court's role, ensuring an effective protection of rights whilst still lending considerable weight to the margin of appreciation and the principle of subsidiarity.

The backwards looking assessment of the Court could remain a further hurdle to jump to make especially the mitigation obligation effective. Currently the rules precluded from this thesis concerning victimhood requires that the individual applying to the Court is a victim of a violation. As has been shown in the thesis the effects how global warming are already here and some people could likely fall into this category. Yet, the pool of potential victims that will result from the as of now inevitable continued rise of temperature probably do not. Subsequently they would lack the protection these obligations might create. To remedy this situation the rules concerning potential victims could be extended to include potential victims of climate change that can produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur. In so doing the ECtHR would expand the protection of the obligation to thousands more. Moreover, it would make it easier to tackle the fact that certain effects of GHG release take time to appear. How precisely this is to be achieved however is a topic of another thesis.

Furthermore, additional clarification by the Court regarding certain terminology could aid greatly in the implementation of the proposed obligations. This is particularly true when it comes to the use of the term immediate in the case of the real and immediate standard, and imminence in the case of natural disasters. The current confusion as to the precise meaning of the term causes problems regarding in what precise circumstances and to what extent the proposed obligations would come into effect.

The current situation and the future predictions concerning the effects of climate change are and seem to remain grim. With the increased temperatures, heavy rainfall and rising sea levels the right to life and health in Europe are threatened and will only become more so as time passes. The world is changing faster than the drafters of the Convention ever could have imagined in the mid-20th century. The ECHR must continue to be a bulwark against threats to our human rights. How can that be done if thousands are left unprotected to the blistering heat, the indomitably rising waves of the ocean or the crashing waves of floods? Above adjustments and clarifications are not hard to achieve. Implementing them would help ensure that the ECHR remains effective and that the rights enshrined in articles 2 and 8 are followed, that the right to life and health are protected.

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